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IN THE

Supreme Court of the United States

October Term, 1977

NO. 77-1760

DILLON MATERIALS HANDLING, INC.,
Petitioner,

v.

ALBION INDUSTRIES, A Division of
KING-SEELEY THERMOS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court
Of The United States:

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on February 16, 1978, affirming the judgment of the district court (U.S. D.C., N.D. Tex.)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 567 F.2d 1299, and is reproduced in Appendix A. The judgment and findings

and conclusions of the district court are unreported, and are reproduced in Appendices C and D.

JURISDICTION

Final judgment of the Court of Appeals was entered on February 16, 1978. Petition for Rehearing was denied on March 16, 1978. (Appendix B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A jury found the respondent-defendant Albion Industries guilty of engaging in exclusive dealing in violation of § 3 of the Clayton Act and awarded petitioner-plaintiff Dillon damages for loss of profits on sales of Albion products (casters and wheels) in the amount of $91,249.00 and damages for loss of profits on sale of non-Albion products in the amount of $30,584.00. R. 325. The district court rendered judgment n.o.v. on the basis that the evidence did not support the finding that the exclusive dealing "may tend to substantially lessen competition."[1] R. 336. The Fifth Circuit Court of Appeals expressed agreement with the action of the district court and, in addition, held that there was insufficient evidence to support the finding that sales of Albion distributors were made upon a condition, agreement, or understanding of exclusivity.[2]

The questions presented are:

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1. The trial court also found that there was insufficient evidence to support the damage finding with respect to non-Albion products. In addition, the trial court refused to submit "Rule of Reason" and "tying" instructions requested by Petitioner. These Points were preserved on appeal, but are not discussed in this Petition.

2. This point is the only one discussed in the Court of Appeals' opinion.

1. What is the proper standard for determining sufficiency of the evidence in an antitrust case?

   A. Did the Court of Appeals effectively deny the Petitioner the right of trial by jury guaranteed by the 7th Amendment by improperly applying a subjective standard?

   B. Did the Court of Appeals err in concluding that the evidence was insufficient to support the exclusive dealing finding?

2. What is the proper test for determining whether the effect of an exclusive dealing practice "may be to substantially lessen competition" under Sec. 3 of the Clayton Act?

   A. What is the proper reconciliation of the "industry leader" test of *Standard Fashion v. Magrane*, 258 U.S. 346, the "quantitative substantiality" test espoused in *Standard Oil of California v. U. S.*, 337 U.S. 293 (1949) and the "qualitative substantiality" test set forth in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961)?

   B. Did the Court of Appeals and the trial court apply an improper test and err in holding that the exclusive dealing practice was not such as "may tend to substantially lessen competition?"

STATUTES INVOLVED

Section 3 of the Clayton Act (15 U.S.C. § 14) reads, in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities whether patented or unpatented, for use, consumption, or resale within the United States . . . on the condition, agreement or understanding that the . . . purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the . . . seller where the effect of such . . . sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

STATEMENT OF THE CASE

A jury found the Respondent Albion guilty of engaging in an exclusive dealing conspiracy in violation of Sec. 3 of the Clayton Act, and of terminating Petitioner Dillon's distributorship in the Dallas area because of noncompliance with the exclusive dealing requirement.[3]

The trial court rendered judgment n.o.v., holding that the jury's finding that the exclusive dealing "may tend to substantially lessen competition" was not supported by sufficient evidence. The Court of Appeals did not reach this point for discussion. Instead, it held that the evidence did not raise a jury issue of exclusive dealing.

The case concerns the caster and wheel industry.[4]

3. Albion was also found to have engaged in a prohibited territorial allocation conspiracy in violation of Sec. 1 of the Sherman Act, but this was not found to be a cause of Dillon's termination.

4. A caster is identified as a "wheel and fork assembly." R. 80. The industry is divided into three basic categories-decorative, institutional (or commercial), and industrial. R. 80-85. Decorative casters are those such as are used on furniture. Institutional and commercial casters refer to casters used on carts and rolling equipment in hospitals, schools, etc. R. 82-83. Industrial casters are those used in industry and are identified by capacity and special applications. R. 85. Each category constitutes a definite, separate market which is easily identifiable by the type of caster. R. 83. Within each category, e.g., industrial, there are types of casters identified by capacity and application which are not interchangeable with other types, and therefore may be considered "subcategories" for which there are definite markets. R. 85, et. seq.

Dillon first began handling Colson casters, which was primarily an institutional line with some industrial items. Later, Dillon acquired Sheppard, a decorative line. To implement a desire to present a complete line of casters, and emphasize caster sales, Dillon searched for a manufacturer offering complete industrial coverage. Albion was the only company found in this category.[5] Albion produces the most complete line of industrial casters available in the industry.

Dillon secured the Albion distributorship in November, 1971. At the time, Mr. Karmalski, Albion's president, objected to Dillon's handling of competitive products, questioning the relationship of Dillon with Colson. He twice expressed concern about Colson. R. 111, 122. Mr. Davis, Dillon's principal, took the position that though Colson's 05 series and the Albion 62 series compared, Colson wasn't competitive with other items that Albion produced. R. 113. Above the Colson 05 series, the Colson line was not considered competitive in any way with the Albion line. R. 114. Therefore, Mr. Davis told Mr. Karmalski and Mr. Fierke, Albion's sales manager, that all the business that Dillon generated for the 62

5. At time of trial, there was still no other company offering a complete line of industrial casters. R. 108.

series and up would be given to Albion.[6] Later, Mr. Fierke testified that he was under the impression that Dillon would phase out sales of Colson products altogether.

Dillon was granted an "exclusive stocking distributorship" within a specified area, in which Albion agreed not to sell or ship direct, and Dillon agreed not to sell in any other area within which Albion had effective distribution, i.e., one within which there was an Albion distributor.[7]

The distributorship agreement Dillon received was typical of the type of agreement given all stocking distributors. All Albion distributors have basically the same agreement, all are treated alike, and the same basic policies are applied and do not vary from one distributor to the next. Mr. Karmalski established the basic policies. He was succeeded by Dobbins January 1, 1972, but no changes in policy were made, and Albion continued operating on the basic policies established by Karmalski. R. 512. The exclusive dealing policy is illustrated not only by the arrangement with Dillon but also by Albion's correspondence with distributors setting forth Albion's prohibition against handling of competitive products. R. 477-495.

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6. The court of appeals characterized this as a "gratuitous offer". But it is apparent that the jury was justified in concluding that it evidenced an exclusive dealing agreement, since it was made in response to repeated objections to handling of competitive goods, and was immediately followed by the granting of the distributorship agreement.

7. Dillon's territory was referred to as a "protected" area, in accord with Albion's "policy". R. 117-120. There will be no further elaboration upon the facts concerning the territorial division, in view of the jury's finding that such was not a cause of termination.

In March, 1973, Bob Bretelle, appointed as Albion's sales manager to replace Mr. Fierke, visited Dillon's place of business in Dallas. R. 141. He advised Mr. Davis that Albion was going to have to have more business from Dillon.[8] A heated discussion ensued, and Bretelle reiterated that Albion wanted more business, and said that Dillon could start by giving Albion the Colson business, which did not sit well with Mr. Davis. R. 145-146.

After Bretelle's visit, the relationship between Dillon and Albion deteriorated. Dillon experienced difficulty in getting shipments out of the Albion plant. Dillon had trouble getting information as to when the products were going to be shipped, and the information received proved not to be accurate. There was delay in filling orders. In 1972, the average time for filling orders was less than two or three weeks. In 1973, Dillon experienced delay up to four months. R. 152. This caused cancellations from customers, and discouraged the placing of orders by customers with Dillon and by Dillon with Albion. R. 153.

Bretelle again visited Dallas in February of 1974, at which time he cancelled Dillon as a distributor. When asked why, Bretelle replied, "everyone knows you are running around making speeches for Colson", and "we have made a deal with Wes Hale and Truman Powers to take over this area and that's it." In summary, Bretelle gave Mr. Davis no reasons for cancellation other than

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8. Dillon had placed orders approximating $100,000 with Albion during the first full year in operation, which was considered good performance by both Dillon and Albion, and compared with approximately $12,000 in orders placed by A. C. Andrews, the distributor preceding Dillon, in its last year as an Albion distributor. R. 111.

the fact of handling Colson products, and the fact that Dillon had shipped outside its territory. R. 159.

Bretelle wrote a memorandum, at the request of Dobbins, on the plane on the return trip from Dallas. P.Ex. 5, R. 575, et. seq. The memorandum demonstrates that the primary concern of Albion and the dominant reason for cancellation was the handling of competitive (Colson) products by Dillon. R. 575, et. seq.

After Bretelle's visit, Mr. Davis called Mr. Dobbins, to ask why Dillon was being cancelled. Dobbins said that Dillon was probably one of the best caster houses that Albion had come across and that Dillon had a good organization and knew how to sell casters, and that if it wasn't for Colson "we wouldn't be having a problem in the first place." R. 165.

After Bretelle's visit to Dillon in March, 1973, Bretelle had reported to Dobbins dissatisfaction that Dillon was handling Colson. R. 533. At this time, however, Albion did not have a replacement for Dillon. R. 532. In late 1973, Mr. Dobbins learned that Mr. Hale and Mr. Powers wanted the Dallas distributorship. Mr. Powers was the Albion distributor in Houston. R. 544. Mr. Hale and Mr. Powers visited Albion in early 1974. R. 548. This visit "crystallized" Dobbins' "thinking" and offered an opportunity to replace Dillon. R. 532. On the day that Hale and Powers visited Albion, plans were laid to have Bretelle go to Dallas, terminate Dillon, and meet Wes Hale to help him get started in business. R. 557. Before Bretelle went to Dallas he wrote the cancellation letter to Dillon, in longhand, and instructed that it be typed and mailed on the day that he was in Dallas. R. 568-

569.[9] Mr. Wes Hale, who became president of Casters of Dallas, which replaced Dillon, stated that he and his partner, Powers, secured the Albion line because they lacked the complete heavy duty line offered by Albion. Powers and Hale considered that the Albion line, and the Faultless line being handled by Casters of Dallas, were complimentary rather than competitive, and Albion agreed. R. 862. On the other hand, Albion thought there was too much "double coverage", under Dillon, in the Colson and Albion lines. Hale stated that Albion did not like that, and that was the reason he and Powers were able to secure the Albion line. R. 863. Hale and Powers, therefore knew it "wouldn't be a good idea" to put in the Colson line along with the Albion line, *or any line that might be considered competitive in Albion's eyes.* R. 864.

As a result of losing Albion, Dillon no longer offered a complete line of casters to its customers This had a detrimental effect on sales of casters overall. Not only did Dillon lose prospective sales of Albion products, it lost sales of other products as well. Customers who found that Dillon could not furnish Albion went elsewhere to buy casters, and Dillon completely lost certain customers though it could furnish part of their needs. R. 173-174. Dillon's sales decreased by $250,000 in 1975, and its business was rendered unprofitable by the loss of Albion.

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9. A copy of the letter was sent to B & F Casters and Wheels, Mr. Powers' company in Houston. The company formed by Hale and Powers to operate the distributorship in Dallas was called Casters of Dallas. R. 570-571.

1. Application of the proper standard for determining sufficiency of the evidence requires that the jury finding of an exclusive dealing practice be upheld.

The trial court accepted the jury's finding that sales to Albion distributors were made upon a condition, agreement or understanding of exclusivity. The Court of Appeals held the evidence insufficient to support the finding. In this, the court failed to properly assess the evidence, ignored objective standards for determining sufficiency of evidence, and substituted its factual determination for that of the jury.

The evidence, when properly viewed, clearly supports a finding that the defendant conditioned sales to distributors on the agreement that the distributors not deal in competitive goods. This is best shown by examining the contrary argument of the Court of Appeals.

With respect to the exclusive dealing requirement applied to Dillon, the lower court concluded that there was a mere "gratuitous offer" by Davis not to handle certain Colson products. The court offered no explanation as to why it felt that a "gratuitous offer" could not be the basis for the finding of exclusive dealing. It is apparent that the offer, solicited or gratuitous, was accepted by Albion, either overtly or implicitly. However, the record does not justify the "gratuitous" characterization. Karmalski objected to the handling of competitive products and twice expressed concern about Colson. R. 111-122. It was only upon Davis' representation that Colson and Albion were not competitive below the Colson 05 and Albion 62 series, and that all business from the Albion 62 series and up would be given to Albion, that the distributorship was granted. Albion was persuaded on the strength of the representation, *ergo*, the representation became one of the governing terms of the relationship. In fact, according to Fierke, Albion believed Dillon would discontinue Colson altogether. It is clear that the jury was justified in finding that sales to Dillon were made upon a condition of exclusivity imposed by Albion.

The jury was equally justified in finding that the same type of arrangement existed between Albion and its other distributors.

The court of appeals concluded that the claim that the exclusivity requirement bound all Albion distributors was unsubstantiated. But the court ignored testimony of Albion officers that all distributors were treated the same, that they were all governed by the same policies, that Mr. Karmalski was responsible for formulating the policies, and that those policies were continued, unchanged, after Mr. Dobbins took office. This, together with the prohibition against the handling of competitive goods imposed on Dillon, is sufficient to sustain the jury's finding.

Letters covering more than 20 years' time were also introduced, and established that the exclusive dealing requirement was imposed on other distributors. On November 29, 1950, Mr. Karmalski wrote Harold Taylor, a prospective distributor and stated: "If you are interested in stocking our casters instead of those you have at the present time and handling the territory outlined above, I would appreciate hearing from you within the next few days." P.Ex. 10, P. 58. Mr. Taylor responded promptly (on November 30) and said he was definitely interested in handling Albion instead of those he had in stock and

". . . just as soon as we can run our present stock of these casters down and they will be replaced with the comparable Albion number." P.Ex. 10, p. 59. On August 26, 1954, Mr. Karmalski stated in a letter appointing Industrial Service Company an Albion stocking distributor: "I am assuming that you will not handle any conflicting lines of casters as long as you are our representative on an exclusive basis." P.Ex. 10, p. 17. On November 1, 1954, Mr. R. B. Davis, Albion vice-president, wrote the Industrial Equipment Company: "In entering into this agreement it is assumed that you will not handle casters of a competitive manufacturer except for requirements which we cannot fulfill." P.Ex. 10, p. 13. On June 30, 1955, Mr. C. W. Burns, Albion vice-president, wrote the Invincible Equipment Company: "It is also our understanding that during the period of this agreement that you will not handle a competitive line of casters, although we will not object to your handling another line of institutional casters." P.Ex. 10, p. 18. On May 8, 1964, Mr. Burns wrote Material Handling Products Corporation: "We expect however, that your company will carry a representative stock of Albion Industries, Inc., casters, and that you will not promote the sale of or sell competitive lines of casters while this agreement is in effect." P.Ex. 10, p. 23.

Of course, it is true that other letters appointing stocking distributors do not contain express exclusive dealing provisions. But all of such letters make reference to "exclusive" representation, in one form or another. It is clear from reading the letters that Albion used the term "exclusive" to comprehend "exclusive dealing" as well as "exclusive representation." This is evidenced by the letter of August 26, 1954, in which the distributor is told not

to handle conflicting casters as long as it remained the Albion distributor "on an exclusive basis." It is also evident from a letter dated May 19, 1961, in which Karmalski told S. Riekes and Sons: "Again, I want to assure you that we will work with S. Riekes and Sons to whatever extent necessary, and would not allow any interference in your operation where we have the exclusive arrangements." P. Ex. 10, p. 42. Two additional letters eliminate any doubt that exclusive dealing is a concomitant of exclusive representation. On November 5, 1971, Mr. Fierke wrote to Industrial Equipment Company appointing it as an Albion stocking distributor with "full protection in the State of Arizona." P. Ex. 10, p. 14. To effectuate this appointment, it was necessary to change the arrangements with Dunn and Company, and Mr. Fierke wrote Dunn on November 24, 1971: "I am certain you can understand Albion's position in this as we now have a distributor who will sell Albion exclusively in the State of Arizona." P. Ex. 9, p. 76. With this practice so firmly engrained in Albion's "policy" it is no surprise that Dillon inquired of Albion by letter dated July 21, 1972: "Do you consider Jarvis and Jarvis (another caster company) as a competitive line?"

The lower court said that there were only four pertinent letters, which letters "fell short" of establishing a "policy" and could not be "propelled" past the date of the last letter, i.e., May 8, 1964. This analysis simply cannot be reconciled with the facts demonstrated by the foregoing letters, which extend through 1971, and show that exclusive dealing was understood to be part of the exclusive representation of Albion; nor can it be reconciled with the facts applicable to Dillon and the testimony that *all distributors* were bound by the same re-

quirements and policies, and that *those policies have never changed*. The letters were not explained by Albion as aberrations, nor was any attempt made to demonstrate a policy change after the authorship of the letters. Not a word of evidence was offered to the effect that the exclusive dealing requirement imposed on Dillon and the other distributors was not part of the "same policy" and "same treatment" applied to all distributors, although Mr. Fierke was cross-examined in detail about certain of the letters. Not a single distributor testified to refute the applicability of the exclusive dealing requirement. In short, the evidence was simply ignored by Albion, with a bland assertion that there was no restrictive policy. The court of appeals also ignored the evidence, apparently with the same indifference.[10]

Insofar as "propelling" the policy further, Mr. Davis' testimony illustrates that the policy was in effect at the time the agreement between Dillon and Albion was entered into in the latter part of 1971. The testimony of Wes Hale demonstrates that it was in existence at the time that Dillon was terminated.

It is clear that the finding of the jury that there was an exclusive dealing agreement, applicable not only to Dillon, but to other Albion distributors, is well supported by more than substantial, and adequate, evidence.

The lower court acknowledged that Wes Hale and Truman Powers testified that in light of Dillon's experi-

10. In addition to the letters specifically mentioned above, P. Ex. 10, p. 63 is an agency agreement dated February 1, 1970, which further evidences the policy of Albion against its representatives handling competitive lines. One of the terms of the agreement is that:

> "The agent will not handle competitive lines to those shown above, which are produced by the principal (Albion)."

ence they did not think it would have been "a good idea" to handle Colson and that they promised to place their "major emphasis" on Albion in Dallas, but failed to observe that Wes Hale testified that he did not "think" it would be a good idea *to handle any product competitive to Albion*. The court says that the record shows that Casters of Dallas actually sold and continued to sell competitive goods, but this is contradicted by the record. As pointed out above, Hale and Powers considered that the Faultless line handled by Casters of Dallas was complimentary and not competitive to the Albion line, *and Albion agreed*.

With respect to the termination, the lower court conceded (as it was bound to do, since there was direct evidence from Defendant's witnesses) that the handling of Colson products was a cause of termination. But, remarkably, the court concluded that "the evidence is at least as consistent with Albion's claim that Dillon was terminated in part because of a lack of Albion sales as with Dillon's contention that it was terminated for the mere sale of Colson casters." This paradoxical quotation, construed literally as the court intended (to defeat recovery), represents total misapprehension of elemental rules of causation. Albion contended that Dillon was terminated *solely* because of its lack of sales and other operating deficiencies, and that the termination was in no way motivated by the handling of Colson or competitive products. Dillon contended that its handling of Colson or competitive products was *a* proximate cause of its termination. It is well settled that there may be more than one proximate cause of a damage producing event. As long as any one of the proximate causes is actionable, recovery may be had regardless of the inno-

cence of the other proximate causes. This principle applies with equal vigor to antitrust cases as to any other type of civil tort action. The jury issue was whether the handling of competitive goods was *a* proximate cause of the termination. The court's opinion appears to concede the sufficiency of the evidence to support this finding by the jury, but indicates that recovery is defeated if the evidence is "as consistent with" a claim that the termination was "in part because" of another, and innocent, reason. But recovery is defeated only if innocent causation is the sole causation, i.e., is exclusive of actionable causation. The court's language to the contrary is indicative of the lack of basis for its opinion.

A. The evidence is sufficient even under the erroneously applied *Boeing v. Shipman* test.

The court of appeals' quarrel appears to be more with the quality of the evidence offered by Plaintiff than with the quantity. In the discussion by the court, there is a repeated "offsetting" of Plaintiff's evidence by testimony offered by Defendant, as though the countervailing evidence destroyed the force of Plaintiff's evidence. In this approach, the lower court purported to apply the test of *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969). Under that test,[11] all evidence must be considered,

11. The *Boeing v. Shipman* test is stated as follows (pp. 374-375): "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of

including all reasonable inferences, and, viewing the evidence in favor of the party opposed to the motion, if there is evidence opposing the motion on which reasonable men could base a conclusion, the case must be resolved by the jury. If there is any "substantial" evidence supporting the finding of the jury, that finding must be upheld. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. The case should not be decided by which side has the better of the case, nor should a motion be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in "substantial" evidence to create a jury question.

If this test can be considered to establish objective criteria, it is more than adequately met by the evidence in the present case. It is clear that there was "substantial evidence" of exclusive dealing on the basis of which a twelve-man jury and a trial judge, as reasonable men, could (and did) base a conclusion. However, though *Boeing* was satisfied, it should not have been applied.

such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

This petition presents two important questions relating to *Boeing* and the test for sufficiency of the evidence. The first question is whether *Boeing* may properly be applied in an antitrust case. It appears that the Supreme Court has already determined the standards applicable in such cases, and *Boeing* represents a deviation from those standards. The second question is broader in scope, i.e., whether Boeing embraces standards for determining sufficiency of the evidence in common law actions that are in conflict with the Seventh Amendment and standards approved by the Supreme Court. These questions will be discussed in order.

B. The Supreme Court has approved standards in antitrust cases contrary to those of *Boeing v. Shipman*.

Moore's Federal Practice and Procedure, § 50.02[1], et. seq., contains a thorough review of the problems in determining the absence of a controverted issue of fact. *Moore* states that although the language of the opinions concerning directed verdicts is extremely varied, it is now clear that a verdict will normally be directed when both the facts and inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion. This is a safe and acceptable generalization, but difficulties are encountered in defining the elements of the general rule, and applying them, without introducing subjective elements that cause the destruction of the intent of the Seventh Amendment.

Before *Brady v. Southern Railroad*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943) federal courts had

not clearly opted between a "strong preponderance of the evidence" standard and the "reasonable man" standard. In the *Brady* case, the Supreme Court made the choice:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims."

Since the *Brady* case, the federal courts have been reasonably consistent in applying the rule that a verdict may properly be directed when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, but when there is conflicting evidence, or there is insufficient evidence to make only a "one way" verdict, a directed verdict is improper. *Moore's Federal Practice and Procedure*, § 50.02 [1]. The federal courts generally reject the so-called "scintilla rule" by which a court might not direct a verdict so long as there is *any* evidence in support of the proposition advocated by the non-moving party. *Ibid*. Still, the party moving for a directed verdict has a significantly difficult burden of persuasion. The established rules require the trial court to view the evidence in the light most favorable to the party against whom the motion is made, and give him the advantage of every fair and reasonable intendment that the evidence can justify. *Ibid*. *Moore's* summarizes in the following quotation:

> "The judicial authorities on the question of the proper standards for directing a verdict would seem to be pretty much in accord. The language utilized remains diverse, and, occasionally, troublesome. Essentially what the cases reveal is not a difficulty of ascertaining a proper standard but a difficulty in applying the standard to the varying facts of the individual cases." *Ibid.* § 50.02[2].

Boeing v. Shipman represented an effort by the Fifth Circuit Court of Appeals, *en banc*, to establish standards readily applicable to "varying facts of individual cases." Only two years before the *Boeing* decision, the Fifth Circuit, in *Planters Mfg. Co. v. Protection Mutual Ins. Co.*, 380 F.2d 869 (1967) had held that federal courts may apply the same standards employed in FELA cases to diversity cases in determining sufficiency of evidence to raise a question of fact for the jury. The *Planters* case adopted, as the proper standard, the holding in *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), which is as follows:

> "If proven facts do give support to the inference necessary to sustain a plaintiff's case, then, under the rule of *Lavender*, it is immaterial that they give equal support to a contrary inference. It is only when there is a *complete absence of probative facts* to support the conclusion reached that the jury's judgment may be ignored." (Emphasis supplied.)

In *Boeing*, the court rejected the *Planters* principle and held that the "FELA test is peculiar to *that kind* of case as a consequence of the statute itself and is accordingly not applicable in non-FELA jury trials." (Emphasis supplied.) The court stated that ". . . in non-FELA federal cases *which are not based on statute*, the formulation

of the test of sufficiency of evidence is substantially different." (Emphasis supplied.)

Thus, it appears from the language of the opinion that the "substantial evidence" or "reasonable man" test formulated by *Boeing* was never intended to have application to statutory actions such as FELA and other cases "based on statute." Antitrust cases are clearly "that kind" of case, a proposition recognized by the Supreme Court but forgotten by the Fifth Circuit Court of Appeals.

The Supreme Court has formulated definite standards for viewing sufficiency of the evidence in statutory actions. The standards are essentially the same, regardless of the statute under which the case arose.

Brady v. Southern Railroad, supra, was an FELA action. The court there pointed out that the weight of the evidence must be more than a "scintilla" before the case may be properly left to the discretion of the jury. Further, the Court held that when the evidence is such that, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding, but otherwise the determination should be left to the jury.

Lavender v. Kurn, 327 U.S. 645, 69 S.Ct. 740, followed *Brady*, in 1946. In that FELA case the court stated:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reason-

> able inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.*" (Emphasis supplied.)

United States v. Smith, 331 U.S. 477 (1946) applied the same principles, in a Safety Appliance Act case. Quoting *Galloway v. United States*, 319 U.S. 372, 395, the court stated:

> The "essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

In *Tenant v. Peoria and P.U.R. Co.*, 321 U.S. 29, 35, 88 L.Ed. 520, 525, 64 S.Ct. 409, the court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences."

In *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 100 L.Ed. 668, 78 S.Ct. 608 (1955) the court said:

> "The very essence of its [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty."

In the case of *Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 10 L.Ed.2d 80, 83 S.Ct. 965 (1963) the respondent introduced evidence that it was physically impossible for the accident to have happened in the manner claimed by petitioner, but the court stated:

> "The conflict in the testimony was resolved by the jury's verdict in favor of the petitioner. Since there was an evidentiary basis for that verdict, it was error for the New York trial and appellate courts to re-evaluate the conflicting evidence and mandate a result opposite from that reached by the jury."

See also *Dennis v. Denver & Rio Grande Western R. Co.*, 375 U.S. 208, 11 L.Ed.2d 256, 84 S.Ct. 291 (1963).

The same standards applicable to FELA, Safety Appliance and Jones Act cases (best enunciated in *Lavender v. Kurn*) have been consistently applied by this court in antitrust cases. The most often cited authority for this proposition is *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 82 S.Ct. 1404, 370 U.S. 690 (1962). There, the court stated:

> "The court of appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. From our examination of the rather extensive record, we have concluded that the court of appeals departed from this rule and erred in holding that there was insufficient evidence to support a finding that respondent's conduct in fact caused injury to Continental's business."[12]

12. In a footnote, the court quotes Professor Moore's statement that the evidence must be considered in its strongest light in favor

On two occasions in the course of the opinion, the court cited the case of *Tenant v. Peoria, supra*, an FELA case. If any doubt is left after reading the statement of the rule contained in *Continental* this makes clear that the court considered the same standards applicable to both FELA and antitrust cases.

The Fifth Circuit applied *Lavender v. Kurn* in an antitrust action in *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383 F.2d 97 (1967). Two years later, the *Boeing* case was decided. In distinguishing standards applicable to FELA cases,[13] the court stated that "trial by jury is a part of the remedy" in FELA actions, and quoted Mr. Justice Douglas from *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 69 S.Ct. 413, 420, 93 L.Ed. 497 (1949):

> "The Federal Employer's Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operation."

This type reasoning was applied in antitrust cases in *Fleitman v. Welsbach Street Lighting Co.*, 240 U.S. 27, 29 [36 S.Ct. 233, 234, 60 L.Ed. 505], and *Beacon Theatres,*

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of the party against whom the motion is made, and the court must give him the advantage of every fair and reasonable intendment that the evidence can justify. The court said that the same rule governs in ruling upon motions for directed verdict in treble damage suits under the antitrust laws, and in support of this proposition cites *Schad v. Twentieth Century Fox Film Corp.*, 136 F.2d 991, 993 (C.A. 3rd Cir. 1943); *Wisconsin Liquor Co. v. Park & Tilford Distillers Corp.*, 267 F.2d 928, 930 (C.A. 7th Cir.); and c.f., *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993; and *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458.

13. And, as noted above, "other cases based on statute."

Inc. v. Westover, 1959, 359 U.S. 500, 504, 79 S.Ct. 948, 953, 3 L.Ed.2d 988, wherein the Supreme Court stated that "the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly a rule of trade." The same statement is echoed in the Fifth Circuit opinion in *Cherokee Laboratories, supra*. Thus, the same basic reason for applying the rule of *Lavender v. Kurn* to FELA cases applies, with equal force, to antitrust cases, and explains the adoption of the same standards in the two types of cases.

The substantive nature of antitrust actions is also comparable to that of FELA actions and dictates the use of the same evidentiary standards. In the *Boeing* opinion, the court, citing *Chicago, Rock Island & Pacific Railroad Co. v. Melcher*, 333 F.2d 996, 999-1000 (8th Cir. 1964), noted:

> ". . . The jury's power to engage in inferences must be recognized as being significantly broader than in common law negligence actions."

This statement applies with even more force to antitrust actions. Witness the following from *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 58 L.Ed. 1490 (1914):

> "But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done; and when, in this case, by concerted action

> the names of wholesalers who were reported as having made sales to consumers were periodically reported to other members of the association, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred."

In *American Tobacco Co. v. United States,* 328 U.S. 781, 90 L.Ed. 1575, the court said:

> "No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the persons accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in an exchange of words . . . Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified. Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential . . ."

In judging an attack upon the sufficiency of evidence in an antitrust case, the court in *Standard Oil of California v. Moore,* 251 F.2d 188 (9th Cir. 1957) stated at page 198:

> "The evidence is legally sufficient to support a jury finding on any question of fact if it is of such substance and character that reasonable men might

> reach that conclusion. In determining whether the evidence meets this test, all reasonable inferences therefrom favorable to the verdict are to be drawn. Likewise all conflicts between evidence submitted by the prevailing party and the evidence submitted by the losing party are to be resolved in favor of the verdict. *Where testimony submitted by the losing party, although not directly contradicted, is inconsistent with the verdict, it is to be assumed that the jury disbelieved such testimony, as it had the right to do."* (Emphasis supplied.)

See also the following cases, recognizing the problems of proof in antitrust cases and the latitude to be accorded in introduction and consideration of evidence: *Frankfort Distilleries v. United States,* 144 F.2d 824 (10th Cir. 1944, cert. den.); *Peelers Company v. Wendt,* 260 F. Supp. 193 (W.D. Wash. 1966); *Union Leader Corporation v. Newspapers of New England, Inc.,* 180 F.Supp. 125 (D. Mass. 1960) aff'd other grounds, 284 F.2d 582 (1st Cir. 1960, cert. den.); *United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954); *Eastern States Retail Lumber Dealers Association v. United States, supra; Flintkote v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957); *American Tobacco Company v. United States,* 328 U.S. 781, 90 L.Ed. 1575, *supra; United States v. Vehicular Parking,* 52 F.Supp. 751; *United States v. St. Louis Dairy Company,* 79 F.Supp. 12; *American Tobacco Company v. United States,* 147 F.2d 93 (6th Cir. 1944); *Milgram v. Loews, Inc.,* 192 F.2d 579 (3rd Cir. 1951); *Loews, Inc. v. Cinema Amusements,* 210 F.2d 86 (10th Cir. 1954); *Standard Oil of California v. Moore, supra; Amedeo Girardi dba Girardi Bearing Company v. The Gates Rubber Company Sales Division Company, Inc.,* 325 F.2d 196 (9th Cir. 1963).

Poller v. Columbia Broadcasting System, 82 S.Ct. 486 (1962), 368 U.S. 461 examines the test to be applied in granting summary judgments in antitrust cases:

> "It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.' Certainly there is no conclusive evidence supporting the respondent's theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised."

The standards for granting summary judgment should be essentially the same as those for granting directed verdicts, though, perhaps, more cautiously applied. *Poller* demonstrates the importance of the jury's assessment of testimony, and the weight to be given that testimony, a matter that is wholly outside the function of the court.[14]

Since antitrust cases are almost invariably tried upon circumstantial evidence, and inferences are of considerable importance, an appellate court should not be allowed to reject inferences legitimately drawn by a jury. The

14. In the present case, the court of appeals "second guessed" the credibility of the witnesses, and ignored the fact that Albion, with all the facts readily available to it, did not make a direct refutation of the claim of general exclusivity, and did not even adduce Fierke or Bretelle to testify on the point.

Supreme Court recognized this in *United States v. Diebold, Inc.*, 82 S.Ct. 993 (1962) in which it stated: "A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible." The decision of the court turned on inferences drawn from the evidence, just as did the Fifth Circuit decision in the *Cherokee* case, *supra*. The inferences drawn by the jury in the present case were clearly permissible, and based upon "substantial" evidence even under *Boeing*. But the lower court erred in applying the *Boeing* "substantiality" test. Before and after *Continental Ore v. Union Carbide, supra*, the Supreme Court has consistently applied the same basic standards for determining sufficiency of evidence in antitrust cases as are applied in FELA and other statutory actions. Application of those standards in this case mandates reversal.

C. The test of *Boeing v. Shipman* allows the court to subjectively evaluate evidence and is contrary to the Seventh Amendment.

Moore's Federal Practice and Procedure points out that certain courts of appeals have taken the position that FELA cases are "sui generis". *Moore's Federal Practice and Procedure*, § 50.02[2]. The Supreme Court has never embraced this proposition. 2B, *Barron & Holtsoff*, Federal Practice and Procedure, § 1075, pp. 401, 404 (Wright Ed. 1971) points out:

> "It is extremely important to know whether the decisions [in FELA and Jones Act cases] are confined to the particular statutory actions in which they have been handed down. . . .
>
> "A decision by the Supreme Court clearly stating which view it takes as to the scope of the FELA

and Jones Act decisions would be a helpful guidance to the lower federal courts."

Judge Rives, in a dissenting opinion in *Boeing*, discussed the importance of the Supreme Court resolving the issue. Unfortunately, the Supreme Court has not yet done so. Though *Boeing v. Shipman* cannot be applied to antitrust cases, because of the Supreme Court's clear statement of the standards applicable to those cases, the court should finally resolve the issue as to the scope of *Lavender v. Kurn* and the proper definition of rules to be applied to cases outside its scope.[15]

The decision must turn on the Seventh Amendment:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no facts tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The question of sufficiency of the evidence to require submission of a case to a jury thus presents a constitutional problem. *Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458.

The phrase "common law" found in the Seventh Amendment is used in contradistinction to equity, and admiralty and maritime jurisprudence. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 266, 274, 7 L.Ed. 732 (1830). The right of jury trial under the Seventh Amend-

15. If for no other reason, the Court should examine the issue because of the amount of appellate litigation it has spawned and the conflicting statements of principles it has produced. See text of *Moore's*, cited above.

ment does not depend upon the source of the claim, whether from common law or from state or federal statute, but solely on whether the claim should be characterized as legal rather than equitable or in admiralty. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 378, 33 S.Ct. 523, 57 L.Ed. 879 (1913); *Luria v. United States*, 231 U.S. 9, 27, 28, 34 S.Ct. 10, 58 L.Ed. 101 (1913); *Simler v. Conner*, 372 U.S. 221, 222, 83 S.Ct. 609, 9 L.Ed.2d 91 (1963).

This being the case, where is the authority for a different kind of jury trial in FELA and actions based on statute than in other types of cases? Nowhere in the FELA statute, or in the antitrust statutes, does the word "jury" appear. It seems therefore, that those courts of appeals that have considered FELA and other statutory actions as "sui generis" are suggesting that the Supreme Court, by mere fiat, has invented for those cases a kind of jury trial neither found in the Constitution or in statutes.

Judge Rives, in his dissenting opinion in *Boeing*, submitted that neither Congress nor the Supreme Court can constitutionally give a broader role to the jury in an FELA or statutory action than that guaranteed by the Seventh Amendment. Judge Rives further submits that the FELA test is a proper, constitutional test and should be applied to all actions. He argued that the same standards of sufficiency of the evidence to require submission of a case to the jury apply in diversity as in FELA cases for these (and other) reasons:

(1) The extreme result reached in FELA cases is because of the substantive elements of the tort,

and not because of any difference in the standards of sufficiency of the evidence to preserve the right of trial by jury;

(2) An action under the FELA is a "suit at common law" as that expression is used in the Seventh Amendment and carries the right of jury trial under that amendment.

(3) The kind of jury trial intended by the FELA as a "part and parcel of the remedy" is none other than the Seventh Amendment right of jury trial;

(4) It cannot be assumed that the Supreme Court, by mere fiat, invented for FELA cases a kind of jury trial found neither in the act nor in the Constitution;

(5) The formulas evolved in the FELA cases and especially in *Lavender v. Kurn* operate to restore the historic common law function of the jury in passing on disputed questions of fact.

The essential failing of the *Boeing v. Shipman* test is that it allows subjective evaluation of the evidence. It is thus fatally defective because it establishes no minimum guidelines on which litigants may safely rely, and allows the Court to supplant the decision-making process of the jury. Thus, a court may substitute its judgment for that of the jury on matters that are reserved, by the Seventh Amendment, exclusively for the jury. This is true because "substantial" evidence is required but there is no definition of "substantial", and it may be viewed either quantitatively or qualitatively. If viewed quantitatively, it allows the court to determine "how much" is "substantial". If viewed qualitatively, it allows the court to be the arbiter of the

quality. In either event, it allows subjective appraisal, wherein the court may determine that it is more "reasonable" than the jury that made the determination.

In summary, *Boeing v. Shipman,* in its application (as evidenced by the present case) allows the court to require more "substantial" evidence than reasonable men, under objective standards, properly should be allowed to act upon in responding to the mandate of the Seventh Amendment. It thus permits subjective evaluation, and substitution of the court's judgment for that of the jury, and should be rejected.

Judge Rives, in his dissenting opinion in *Boeing,* notes the defects in the majority opinion, and suggests that to eliminate confusion resulting from different language used to characterize the sufficiency test, the rule be adopted from either (1) *Lavender v. Kurn,* (2) *Brady v. Southern Railroad,* or (3) the formula for granting a summary judgment. Each of these rules, or tests, is set forth in the preceding section of this petition. Each is essentially to the same effect, though phrased in different wording. It is respectfully submitted that Judge Rives' suggestion should be followed. The court should accept this petition, define the scope of the rules it has advanced in such cases as *Lavender v. Kurn,* and formulate definite standards for testing sufficiency of evidence in all cases arising under the Seventh Amendment.

2. The effect of Albion's exclusive dealing practice "may be to substantially lessen competition".

The trial court accepted the jury finding of exclusive dealing but held that the practice was not such as "may be to substantially lessen competition or tend to create

a monopoly in any line of commerce." Examination of the record, however, reveals that the incipient "may be" test is satisfied.

Albion has the best and most complete line of industrial casters in the industry in the United States.[16] Tested against the Albion line, no other caster manufacturer in the United States has a "complete line" of industrial casters.[17] Albion occupies a position of dominance with respect to industrial casters, i.e., Albion sells at least 70% of all industrial casters sold in the industry.[18] There is a definite competitive advantage in being able to offer a complete line of casters to customers, and, without Albion, a caster distributor cannot offer a complete line.[19] From industry statistics compiled through the caster and forklift association, it is established that Albion has 12%,[20] or 12% in 1975 and 8-10% in 1974[21] of the total caster and glide market, represented by reporting companies, within the United States. Since Albion does not manufacture glides, it is obvious that its portion of the caster volume is larger than 8-10% or 12%. Further,

16. Every witness, whether for Plaintiff or Defendant, who testified on the point agreed with this proposition.

17. This testimony was elicited from Mr. Bretelle, Albion's sales manager.

18. This testimony was given by Mr. Davis, Dillon's principal. For practical purposes, it is undisputed. Mr. Dobbins stated that he did not know where Mr. Davis obtained this figure, and that he did not believe it, but he was unable to offer any statistic or opinion as to the percentage of the industrial market controlled by Albion.

19. This testimony came from Walter Russell, Jerry Gant, Wes Hale, Truman Powers, James Brock, and Dr. Stanley Block.

20. According to Mr. Bretelle.

21. According to Mr. Dobbins.

the figures are not broken down according to type of caster and it is obvious that Albion's share of the industrial caster market is still larger. Since the president of Albion declined to give an opinion or state a figure as to Albion's share of the market, and since he said there are no other industry figures available, the testimony that Albion has 70% of the heavy duty industrial caster market in the United States is the only direct evidence on the point. It is substantiated by abundant testimony establishing Albion's unique and dominant position in the industrial caster market.[22]

Albion's total sales of casters were estimated by Albion's president at trial to be in the range of $8-10 million per year. Sales to stocking distributors in 1971 were $3,649,-715. In 1972, such sales were $4,810,333. In 1973, they were $6,616,723 and in 1974, they were $8,489,788. Thus, it is apparent that the greatest percentage of Albion's sales are to its exclusive stocking distributors. There are forty-one Albion stocking distributors in the major markets throughout the United States who represent (since 1974) over $8 million in purchases from Albion each year. This sizeable market is foreclosed to manufacturers of caster lines considered "competitive" with Albion (and it is within Albion's discretion to determine what is "competitive".)[23]

22. The strength of Albion's position is evidenced by the fact that Dillon's caster sales decreased approximately $250,000 in 1975.

23. Although Albion's president, Dobbins, stated there are 100 caster manufacturers in the United States, Davis said there are only 20-25, Gant said there are about 15, and Goodall, offered by Defendant as an "expert" on competitive manufacturers, named only 4 major manufacturers deemed competitive with Albion. Bretelle, Albion's sales manager, named less than 10 competitors from any stage from the 1950's forward. Thus, it is apparent the jury was

The competitive impact of the exclusive dealing practice is as pronounced at the stocking distributor's level as at the manufacturer's level. Since Albion distributors, through a combination of Albion and "noncompetitive" products, are able to offer a more complete line of casters than other distributors (or dealers) in the industry, they have a distinct competitive advantage in each market in which they operate, a factor conceded by and considered very important to all who testified on the point. The economic impact of this factor is illustrated by the fact that Dillon could not rely upon casters as its primary product after losing Albion, by testimony that Dillon lost $250,000 in gross income in 1975, and by testimony that Dillon's replacement, Casters of Dallas, has begun to reap the benefits resulting from the ability to offer a complete line. The picture that evolves from the evidence is that only distributors having the Albion line are in position to place primary market emphasis on casters. Other distributors sell casters as a secondary product in their mix of materials handling equipment. Thus, the effect of Albion's exclusive dealing practice not only "may be" but *is* "to substantially lessen competition", both at the manufacturer's level and the distributor's level.

A. The "industry leader" test of *Standard Fashion v. Magrane* and the "quantitative" test of *Standard Oil of California v. U. S.* have been met.

The early problems encountered by courts in dealing with Clayton Sec. 3 concerned the phrase "may be".

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justified in concluding that the 17-20 manufacturers reporting to the trade association represent the greater percent of all casters manufactured and sold within the United States. This supports the conclusion that Albion's position in the total caster market is substantial and buttresses Davis' testimony that Albion's share of the heavy industrial market is 70% or greater.

United States v. United Shoe Machinery Company, 264 F. 138 (E.D. Mo. 1920) stated the conclusion "evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do those acts, which may put it in his power to do so." Thus, the court reasoned:

> "The Clayton Act, as the court construes it, is intended as a preventive act, to arrest the creation of trusts, etc., in their incipiency and before consummation, as expressed in the President's Message of January 20, 1914, urging the enactment of supplemental antitrust legislation. . .".

The court then concluded that the question to be decided is whether the practice in question puts it in the power of the defendant, or has the effect, or tends "to substantially lessen competition" or "establish a monopoly".

Two years later the Supreme Court reviewed the trial court's decree, in *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 42 S.Ct. 363 (1922). The Supreme Court observed:

> "While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act, which cover all conditions, agreements, or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopolize is, we believe, equally apparent. When it is considered that the United Company occupies a dominating position in supply-

> ing shoe machinery of the classes involved, these covenants, signed by the lessee and binding upon him, effectually prevent him from acquiring the machinery of a competitor of the lessor, except at the risk of forfeiting the right to use the machines furnished by the United Company, which may be absolutely essential to the prosecution and success of his business."

The court further observed that this system of restrictions is quite as effective as expressed covenants. The fact that the lessor in many instances forbore to enforce the provisions did not make them any less agreements within the contemplation of the Clayton Act.

The comparison to the present case is apparent. The exclusive dealing requirement effectually prevents Albion's stocking distributors from acquiring casters of a competitive manufacturer except at the risk of forfeiting the right to distribute Albion casters, which, as graphically illustrated in Dillon's case, is essential to the "prosecution and success" of the business.

In *Oxford Varnish Corp. v. Ault & Wiborg Corp.*, 83 F.2d 764 (6th Cir. 1936) the appellant Oxford owned and controlled patents for a process of applying to metal or other surfaces a graining simulating the color and appearance of natural wood grains. In its various contracts with licensees, Oxford included covenants to compel or to make desirable the purchase of Oxford's own graining materials, a practice attacked as exclusive dealing under Sec. 3 of Clayton. Oxford contended that it could not be brought within Clayton unless the contract substantially lessened competition or tended to create a monopoly, and that the proof failed to establish either result. (The total business of Oxford in graining supplies during the year in question was $325,000, while the total paint and varnish business of the United States for the same year was $66,000,000 and therefore Oxford's business represented approximately one-half of 1% of the total volume of the industry.) The court responded as follows:

> "While the Supreme Court in cases involving the Clayton Act has upon occasion adverted to the size of the assailed manufacturer or vendor in relation to the business of the industry, we are aware of no pronouncement that proportions are conclusive. Conceivably a business practice may tend to create monopoly though barely entered upon.
>
> "The ratio borne by the defendant's volume of business to the paint and varnish industry is not, we think, the measure by which monopolistic tendency of its contracts is to be determined. While the plaintiff did not produce figures for the volume of business done in graining pastes and the like because none are available, yet the most ordinary observation must convince us that the volume of business in such materials is but a small fraction of the total business of the paint and varnish industry. But even this is not necessarily the measure by which monopoly or monopolistic tendency is to be measured. The defendant is possessed of patents. Such patents grant it a limited monopoly, limited as to time and as to the articles or processes precisely covered by the claims. Within such limitations its monopoly is exclusive and complete-there is no unoccupied area. It seeks by contract to extend within that restricted field the monopoly of the patent to supplies not covered by patent. The record shows it to have been wholly successful. Competitors may not negotiate with its licensees on an equal trading basis—they are wholly and completely shut out. . .".

In the present case, Albion has used its dominance in the industrial caster line to foreclose outlets from the competitive manufacturers and expand its own sales in areas (light to medium casters) in which it does not have a dominant position. The result obviously "may be", and is in fact, "to substantially lessen competition".

The case of *Signode Steel Strapping Co. v. F.T.C.*, 132 F.2d 48 (4th Cir. 1942) involved an appeal from a federal trade commission ruling against the enforcement of conditions, agreements, and understandings that the purchaser of machinery from Signode not use any wire or strapping not acquired from the company. Signode was one of about 100 companies selling wire and strapping for the purpose of making packages. It did approximately 5-7% of business in this field. It was also one of 12 companies engaged in the sale or leasing of tying machines or appliances, which represented about a $9 million per annum industry. Signode did about 20-30% of the total volume of the business done by the 12 companies. However, the court observed that the pertinent line of commerce was the sale of wire and strapping for the purpose of binding packages and not the sale or leasing of tools or machines. After a comprehensive review of the facts, the court concluded:

> "The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or a competitor of the seller, which 'may substantially lessen competition or tend to create a monopoly'.

> "Sec. 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

The court then held that the practice under attack served no purpose except to exclude lessor's competitor's from making sales of wire and strapping to its customers.

The parallel between the *Signode* case and the present case is striking. Albion has a "dominating" position with respect to heavy duty industrial casters. It has as much as 70% of the market for the heavy industrial items. The "line of commerce" comprehended by the court's charge in the present case is the sale of casters and wheels in the United States. There are three separate and distinct markets in the "line" as so defined-decorative, institutional or commercial, and industrial. Albion annually sells a decidedly substantial amount ($8-10 million). Though industry figures are not available to definitely establish its exact market share, figures available through the industry trade association indicate that it has anywhere from 8-12% of the total reported figures, which represent the greater percentage of the total market. Its unique and strong position in the industrial market of the caster industry is used to augment its sales

in the lighter to medium duty segments of the business, for Albion alone determines which caster manufacturers are "competitive". This, therefore, restricts access to the distributor-customers by most other caster manufacturers while conferring a competitive benefit on certain manufacturers whose lines are not deemed "competitive" with Albion. This tendency obviously is to restrict competition both at the manufacturer's level and the distributor's level. The evidence warrants a conclusion that this competition lessening has already reached substantial proportions. Certainly the effect of the practice, unchecked, "may be" to substantially lessen competition.

Standard Oil of California v. United States, 337 U.S. 293, 69 S.Ct. 1051, decided by the Supreme Court in 1949, is one of the leading cases regarding Clayton Sec. 3. It involved an attack upon the practice of Standard in entering into exclusive supply contracts with operators of independent Standard "branded" stations. The court pointed out that since the Act became effective the court had passed upon the applicability of Sec. 3 in eight cases, in five of which the Supreme Court upheld the determinations that the challenged agreement was violative of the Act. Three of the cases—*United Shoe Machinery Corp. v. United States, supra, International Business Machines Corp. v. United States,* 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085, and *International Salt Co. v. United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20,—involved "tying" arrangements, and two of them—*Standard Fashion Co. v. Magrane,* 258 U.S. 346, 356, 42 S.Ct. 360, 362, 66 L.Ed. 653, and *Fashion Originators Guild v. F.T.C.,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949—involved requirement contracts similar to those before the Court. The court concluded that none of them controlled disposition of the *Standard* appeal, because *Standard's* share of the retail market for gasoline, even including sales through company owned stations, was "hardly large enough to conclude as a matter of law that it occupies a dominant position."

The court offered certain observations which are pertinent. It stated:

> "We are dealing here with a particular form of agreement specified by Section 3 and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition. To interpret that Section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out. . .
>
> "We are faced, not with a broadly phrased expression of general policy, but merely a broadly phrased qualification of an otherwise narrowly directed statutory provision.
>
> "In this connection it is significant that the qualifying language was not added until after the House and Senate bills reached conference. The conferees responsible for adding that language were at pains, in answering protestations that the qualifying clause seriously weakened the Section, to disclaim any intention seriously to augment the burden of proof to be sustained in establishing violation of it. It seems hardly likely that, having with one hand set up an expressed prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress meant, with the other hand, to re-establish the necessity of meeting the same tests of detriment to the public interest as that Act had been interpreted as requiring, yet the economic investigation which appellant would have us require is of the

same broad scope as was adumbrated with reference to unreasonable restraints of trade in *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683. To insist upon such investigation would be to stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect 'may be' to substantially lessen competition.

"If in fact it is economically desirable for service stations to confine themselves to the sale of the petroleum products of a single supplier, they will continue to do so though not bound by contract, and if in fact it is important to retail dealers to assure the supply of their requirements by obtaining the commitment of a single supplier to fulfill them, competition for their patronage should enable them to insist upon such an arrangement without binding them to refrain from looking elsewhere."

With these observations, the court held:

> "We conclude, therefore, that the qualifying clause of Sec. 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observation by a dealer of his requirements contracts with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of such widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining of assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of Sec. 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity."

Standard Oil enunciated a simple and direct test, applicable where the defendant does not occupy a dominant position in the market. Though it did not define "substantial share of the line of commerce affected," 6.7% was considered a "substantial share." In the present case, Albion's share of the "line" is $8-10 million per year, which constitutes what is indicated to be at least 8-12% of the "line" and 70% of the industrial "market". Albion's competitors are foreclosed from this portion of the market and distributors who do not have Albion are at a competitive disadvantage which relegates them to offering casters as a secondary product. The test of *Standard Oil* is clearly met. More importantly, it is not necessary to reach the "quantitative test" of *Standard,* because Albion clearly is an industry leader and occupies a dominant position in the market. Under *Standard Fashion* and related cases, this is sufficient to impose liability.

The case of *Dictograph Products, Inc. v. F.T.C.*, 217 F.2d 821 (2nd Cir. 1954), which followed *Standard,* illustrates the "industry leader" test. It involved a review of an order of the FTC directing Dictograph to eliminate from contracts with independent distributors certain restrictive exclusive dealing clauses. The court followed the rationale of the *Standard* case pointing out that the impulsion toward specific proscriptive provisions in Clayton was a desire on the part of the Congress to overrule by legislation an earlier decision by the Circuit Court of Appeals in *Whitwell v. Continental Tobacco Co.*, 125 F. 454 (1903) upholding what was tantamount to the refusal by a leading producer of chewing tobacco to sell to a dealer because the dealer would not agree to deal exclusively in the seller's products. It was to make sure that the "rule of reason" would not be employed to

invalidate further transactions of such a patently undesirable nature that the proscriptive provision in Clayton was thought necessary. The court concluded, because of this history, that the qualifying phrase in no way supports the view that it was designed to effect a renaissance of the Sherman Act type of inquiry into all economic factors in every Clayton Act suit to enjoin the use of exclusive dealing contracts. *The court further pointed out that according to judicial history of Sec. 3, where the alleged violator dominated or was a leader in an industry, proof of such fact was, at an early stage, determined to be sufficient predicate from which to conclude that the use of exclusive dealing contracts was violative of Sec. 3.* The *Standard* case extended the rule to business organizations enjoying a powerful, though clearly not dominant position in the trade. In light of the history of Sec. 3, the court concluded that despite whatever utility the elaborate economic inquiry may have under Sec. 3 when applied to organizations not doing a substantial share of the business or not yet firmly established in a particular line of commerce, *it has no place in a case where the offender is one of the industry's leaders.*

In the present case, of course, it is undisputed that Albion is one of the industry's leaders, and *the* industrial caster leader. Considering the "line of commerce" from the standpoint of the heavy industrial market, Albion is *the* dominant force. Dillon has satisfied its burden of proof under *Standard Oil,* but, more conclusively, it has met the *threshold* requirement of establishing Albion's dominant position in the market which, under *Standard Fashion,* etc., obviates the *Standard Oil* inquiry. Under either view, Dillon was entitled to recover on the basis of the jury verdict.

B. Dillon has also satisfied the qualitative test of *Tampa Electric Co. v. Nashville Coal Co.*

Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, was decided in 1961. It is unique in that it does not involve either a private treble damage action or a justice department or federal trade commission attack. Instead, it involves a breach of supply contract, where the alleged illegality was asserted in defense of the one who had breached (the supplier, Nashville Coal). Tampa Electric was a public utility selling electric energy to a service area from Tampa Bay eastward sixty miles and approximately thirty miles in width. The total consumption of coal in peninsular Florida as of 1958, aside from Gannon Station (the location subject to the contract) was approximately 700,000 tons annually. There were some 700 coal suppliers in the producing area where Nashville operated, and Tampa's anticipated maximum requirements at Gannon Station, i.e., 2,250 tons annually, would approximate 1% of the total coal of the same type produced and marketed from respondent's producing area.

The Supreme Court pointed out that, including the present case, ten Clayton Sec. 3 cases had reached the Court (thus *Tampa* was the first case to reach the Supreme Court after *Standard Oil.*) Following the guidelines of earlier decisions, the Court pointed out that certain determinations must be made. First, the "line of commerce" must be determined. This was defined to be the "type of goods, wares, or merchandise involved." Second, the area of effective competition in the known line of commerce must be charted "by careful selection of the market area in which the seller operates and to

which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market affected." Third, and last, "the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market."

Turning to application of these principles, the Court assumed the line of commerce to be bituminous coal, and the relevant market or area of effective competition to be the area in which the Nashville Coal Co. and the other 700 producers effectively compete. The court then estimated the total relevant coal market as to which the challenged contract pre-empted competition, and stated that "a more accurate figure, even assuming pre-emption to the extent of the maximum anticipated total requirements, 2,250 tons a year, would be 0.777&." The court pointed out that though the dollar volume involved in the contract, over the 20-year period, was substantial, the dollar volume by itself is not the test. The remaining determination, i.e., whether pre-emption of competition to the extent of the tonnage involved tends to substantially foreclose competition in the relevant coal market, prompted the court to make observations as to what was excluded from the court's consideration:

> "There is here neither a seller with a dominant position in the market as in *Standard Fashion, supra,* nor myriad outlets with substantial sales volume coupled with an industry-wide practice of exclusive contracts, as in *Standard Oil, supra;* nor a plainly restrictive tying arrangement as in *International Salt, supra;* on the contrary we seem to have only that type of contract which 'may well be of economic advantage to buyers as well as to sellers . . .'."

Based on these considerations, the court concluded that Sec. 3 was not violated.

In the present case, the "line" of commerce was defined as casters and wheels, but the evidence shows this "line" to consist of three distinct markets. In the industrial market, Albion has a dominant position, with over 70% of the heavy industrial sales, and produces items which are available nowhere else. With respect to casters generally, Albion's market share is smaller (estimated from 8-12%) but it must be remembered Albion's unique position with respect to heavy industrial casters gives it the power to exercise market leverage of the type that is deemed illegal on a *per se* basis with respect to "tying" arrangements. The area of effective competition, i.e., the market area in which the seller operates and to which the purchaser can practicably turn for supplies, is the United States. The competition foreclosed by the exclusive dealing is a substantial share of the relevant market viewed either from the "industrial" or "general caster" standpoint.

Tampa expressly was not concerned with a situation where a seller has a dominant position in a market, as does Albion in the heavy industrial market. The *Standard Fashion* threshold test of dominant position in the market was not questioned by *Tampa,* and Albion's dominance in industrial casters satisfies that test. Nor was *Tampa* dealing with a *Standard Oil* situation, where the practice potentially affects a substantial share (6.7%) of the line of commerce, a test also satisfied by Albion's exclusive dealing practice. *Tampa* does not purport to restrict *Standard Fashion* or *Standard Oil,* but injects a new dimension, i.e., the qualitative element of whether the exclusive dealing may arise from that type of contract

which "may well be of economic advantage to buyers as well as sellers". *Tampa* thus suggests that liability may be established where neither of the more mechanical *Standard Fashion* or *Standard Oil* tests are met.

Albion's exclusive dealing requires censure under *Tampa*. Rather than being the type of arrangement approved by *Tampa*, Albion's practice is of the type expressly condemned by Sec. 3 of Clayton, and the type which, in fact, prompted passage of the Act.

C. The "qualitative" test introduces more flexibility in evaluating exclusive dealing restrictions.

It is pointed out in *American Motors Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3rd Cir. 1975) that *Tampa* adopted a different standard than *Standard Oil's* "quantitative substantiality" test. The "new test", according to the court, is commonly denominated the "qualitative substantiality" test. It introduces greater flexibility and provides for evaluation of the restrictions and economic usefulness of the challenged practice in relation to the business factors existent in the market. But the court also observed:

> "Although the Supreme Court has modified the rigid rule articulated in *Standard Oil*, it has not indicated that the result in *Standard Oil* would differ from *Tampa Electric*. Indeed, the *Tampa* opinion impliedly endorses the result reached in *Standard Oil*. See 365 U.S. at 328-329, 81 S.Ct. 623. Therefore, the district court here would not appear unjustified in comparing the facts before it to those in *Standard Oil*."

Thus, it appears that the "quantitative" substantiality test may still be employed to determine illegality, if the

proof meets the minimums of *Standard Oil of California*. Even if the proof does not meet the minimum quantitative requirments of *Standard Oil*, a jury may determine the practice to be illegal when analyzed under "qualitative" standards, i.e., the more flexible approach of assessing all relevant economic factors and judging whether the exclusive dealing arises out of the type of contract "that may well be to the economic advantage of buyers as well as sellers."

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964) appears to be a practical application of this proposition. There, the court reviewed the evidence and found that the jury could conclude that the exclusive dealing practice affected a substantial portion of Tidewater sales to its dealers (about 5% of the gasoline sold through dealers in the area) and $4-5 million worth of TBA (no percentage of TBA sales to the whole is given.) The court stated that the only serious question presented by the appeal was whether the jury could conclude, on the basis of the facts in evidence, that the practice might substantially lessen competition or tend to create a monopoly in the line of commerce. The court held that a conclusion that the jury finding was supported was required, and made the following observation:

> "As *Tidewater* points out, the percentage of service stations in the market affected by its conduct was not established in the present case, as it was in *Standard*. However, the percentage of sales of gasoline in the area made through Tidewater stations was shown (about 5% as compared to 6.7% in *Standard*), and would seem to reflect the impact of the restrictive arrangements more accurately than would the percentage of retail outlets affected."

After noting that the record did not show the total sales in the western states of *any* TBA items and therefore the share sold through Tidewater stations could not be determined, the court stated:

> "However, knowledge of the share of the market foreclosed is not invariably required to determine whether exclusive dealing arrangements violate Sec. 3 of the Clayton Act. *The test remains whether the jury can find from all the circumstances that the effect of the particular arrangements 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce' and, as the Clayton Act tying clause cases demonstrate, this may appear from facts other than the portion of total commerce in the relevant market, which is subject to restraint.*" (Emphasis supplied.)

In the present case, the evidence meets both the "quantitative" and the more flexible "qualitative" substantiality tests. All relevant economic data, except the specific market share of Albion sales to total casters sales in the United States, is present in the record and afforded the jury more than adequate basis to assess the economic impact (i.e., the potential market foreclosure effect) of Albion's restrictive practice. The jury's determination is well supported by evidence revealing the dominant position of Albion in industrial casters, its substantial strength in the total market, the anticompetitive effect of the enforcement of the restrictive practice, and the substantial amount (dollar volume) of commerce affected by the practice. Albion's market dominance, alone, is sufficient to sustain liability. It is clear that the jury's determination should have been upheld.

CONCLUSION

This court has not made an analysis of the interrelationship of *Standard Fashion, Standard Oil,* and *Tampa.* Though the proof in the present case is sufficient to satisfy each of the three tests, it is apparent that review of Clayton Sec. 3 "may be" requirements by this Court would be of utmost benefit to the courts and to litigants. Likewise, clarification of sufficiency of evidence tests, in antitrust and other types of cases, would serve to simplify and, hopefully, reduce appellate litigation.

This petition should be granted to correct the errors that have been committed. In doing so, the Court should avail the opportunity to bring order to two particularly troublesome areas of the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing document has been forwarded to opposing counsel, Mr. Stanley E. Neely and Mr. Richard G. Rogers, 3600 Republic National Bank Tower, Dallas, Texas 75201, by U. S. Mail on this the 9th day of June, 1978.

Jack N. Price

MR. JACK N. PRICE

APPENDIX A

DILLON MATERIALS HANDLING, INC.,
Plaintiff-Appellant,

v.

ALBION INDUSTRIES, DIVISION OF KING-SEELEY THERMOS COMPANY, Defendant-Appellee.

No. 76-3670.

United States Court of Appeals,

Fifth Circuit.

Feb. 16, 1978.

Former exclusive stocking distributor of casters sued manufacturer claiming alleged violations of the Sherman and Clayton Acts. The jury held for the manufacturer on the Sherman Act claim. The United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., granted manufacturer's motion for judgment n. o. v. on the Clayton Act claim, and plaintiff appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) even absent an express exclusivity requirement an antitrust plaintiff is not foreclosed from making out a case since a course of dealing may ripen into an implied or informal agreement or understanding; (2) proof of percentage market share and dollar volume alone, without any proof of market breadth or exclusive dealing, is not adequate to make out a Clayton Act claim and (3) evidence was insufficient to warrant find-

ing that sales to plaintiff were made on a condition, agreement, or understanding of exclusivity where evidence was at least as consistent with manufacturer's claim that plaintiff was terminated in part because of a lack of sales of its product as with opposing contention that termination was for selling competitive casters.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

Before TUTTLE, COLEMAN and RONEY, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal from a judgment n. o. v. entered by the district court in an antitrust case. The appellant, Dillon Materials Handling, Inc. (hereinafter "Dillon"), was the exclusive stocking distributor for the appellee, Albion Industries, Division of King-Seeley Thermos Co. (hereinafter "Albion"), in the Dallas, Texas area from November 1971 until March 1974. Albion terminated Dillon's distributorship in March 1974, and Dillon responded with this law suit, alleging violations of section 1 of the Sherman Act and section 3 of the Clayton Act. Following an 11-day trial, the district court submitted the case to the jury, which held for the defendant on the Sherman Act claim[1] and for the plaintiff

1. Dillon's First Amendment Complaint alleged that Albion had violated section 1 of the Sherman Act, 15 U.S.C. § 1, by imposing territorial restrictions on the sale of Albion products through its distributors, including Dillon. The jury concluded that although Albion had established exclusive territories for the resale of its products, Dillon's distributorship was not cancelled in an effort to effectuate that system. The jury's findings in this regard are not challenged on appeal.

on the Clayton Act claim.[2] The district court, however, granted defendant's motion for judgment n. o. v. on the Clayton Act claim, precipitating this appeal. We affirm.

This litigation involves the caster industry, which may be divided into three basic categories: decorative, institutional and commercial, and industrial. Within each category, different types of casters are further identifiable by capacity and application. "Decorative" casters normally are used on furniture, while "institutional and commercial" casters are used on various carts and other rolling equipment commonly found in hospitals, schools and department stores. "Industrial" casters encompass those products whose attributes include a higher load capacity and rollability. At least 25 manufacturers[3] compete on a nationwide basis for a share of the markets represented by each of the three categories described above. During the relevant time period, Albion did not offer an institutional line, but did produce the "most complete line" of industrial casters.

Around January 1969, Dick Davis, who later became president of Dillon, was appointed a distributor for the "Colson" line of casters in the Dallas, Texas area. Specificially, Davis purchased the "Colson Southwest Branch" in Dallas, thereby acquiring $34,000 worth of inventory, a place of business and three employees. At the time Col-

2. The money damages awarded Dillon by the jury totalled $121,833.

3. The evidence as to the exact number was inconclusive. Mr. Dick Davis, the president of Dillon, testified that there probably are 20 to 25 caster and wheel manufacturers and an additional 12 companies that manufacture only wheels. However, Albion's president, Mr. Richard H. Dobbins, said in his deposition that there are over 100 caster manufacturers nationwide.

son did not offer a decorative line and its industrial line, in Davis' opinion, was not "complete." Over two years later, in May 1971, Davis purchased Dillon Scale and Equipment Company, which he combined with the Colson Southwest Branch. Davis eventually acquired a line of decorative casters manufactured by Shepherd Products, U.S., Inc. and began marketing Colson and Shepherd casters under a new corporate name, Dillon Materials Handling, Inc.

Davis thereafter surveyed his competition and determined that no other company in the Dallas market was offering a complete line of casters or emphasizing casters as a primary product in the materials handling field.[4] He decided to capitalize on this void and began a search for a more complete line of industrial casters to combine with the Colson and Shepherd lines. Other distributors suggested that he attempt to secure the Albion line, since it was considered to be "the most complete line in the market." Davis' initial attempt to secure the Albion distributorship in Dallas failed. However, when the extant distributor, A. C. Andrews Co., went bankrupt in 1971, Davis initiated negotiations which led to the appointment of Dillon as an Albion distributor. After meeting with Albion's sales manager, Bud Fierke, and president, John Karmalski, Davis secured the Dallas distributorship for Dillon in November 1971.

Davis characterized Dillon's relationship with Albion during 1972 as "super." Sales of Albion's products approached $100,000 for that year. In March 1973, however, Davis was visited by Albion's newly appointed

4. Dillon's arrangement with Colson included, in addition to casters, the sale of wheel cars, stretchers and other products.

sales manager, Bob Bretelle, who told Davis that "Albion [wanted] some more business from Dillon."[5] Brettelle suggested that "[y]ou can start by giving us some of that Colson business." He also complained about the fact that Davis had opened a cart fabrication business in Oklahoma.[6] Brettelle did not return to Dallas in 1973.

After Brettelle's visit, the relationship between Albion and Dillon "deteriorated." Dillon experienced increased delays in obtaining shipments from Albion and, in addition, lost two sizeable accounts during the year.[7] Finally, in February 1974, Brettelle made a return visit to Dallas and terminated Dillon's distributorship. Subsequent conversations between Davis and Richard Dobbins, who succeeded Karmalski as president of Albion on January

5. In its brief, Dillon attempts to negate any inference of an inadequate sales volume by pointing out that its 1972 sales ($100,000) far exceeded the 1971 sales of its predecessor, A. C. Andrews Co. Although it is true that Andrews sold only $12,000 worth of Albion products in 1971, the company was on the verge of bankruptcy early in 1971 and did finally declare bankruptcy later that year. Thus, although Davis may have thought that Brettelle had no reason to complain about the first-year sales, a quantitative comparison of Andrews' and Dillon's annual sales is of little value.

6. In early 1973, Davis established a cart fabrication operation called Materials Handling, Inc., expecting to thereby increase his caster sales. Brettelle's concern in this regard was that other cart manufacturers which purchased Albion casters might object to competition from a company as closely associated with Albion as was Dillon. Later, after the fabrication plant began production, Brettelle objected to the amount of time Davis spent at the plant.

7. The record shows that the 1973 shipment delays were attributable at least in part to an industry-wide materials shortage and a sudden influx of new business. There also was testimony that Dillon had a similar problem with other manufacturers. We mention this evidence only to negate any inference that the shipping delays were a form of retaliation for any of Dillon's business practices to which Albion objected.

1, 1972, failed to alter Albion's position. The Dallas distributorship subsequently was awarded to Casters of Dallas, Inc. (hereinafter "Casters"), a materials handling concern formed by Wes Hale and Truman Powers. Hale served as president of Casters, while Powers was president of B & F Casters, a Houston, Texas company that held the Albion distributorship in Houston.

[1] On September 19, 1974, Albion filed suit against Dillon, alleging numerous violations of the federal antitrust laws. The specific allegation involved in this appeal is that Albion imposed on its distributors an exclusive dealing policy which required the distributors not to sell casters manufactured by Albion's competitors, in violation of section 3 of the Clayton Act.[8] Dillon claimed that its distributorship was terminated because of noncompliance with the policy and that it lost sales as a result.[9] The jury concluded that Albion had violated section 3 in the manner alleged and awarded damages to Dillon. A judgment n. o. v. was entered by the district court because there was "insufficient evidence to support the jury's implicit finding that the effect of any exclusive dealing agreement may have been to substantially lessen competition or tend to create a monopoly in a line of commerce."[10] It is from this judgment that Dillon appeals and to which we must now turn our attention.

8. The complaint charged that this policy constituted a "per se" violation of the Clayton Act; however, it is well settled that exclusive dealing arrangements are not per se illegal. *Hoopes v. Union Oil Co.*, 374 F.2d 480, 486 (9th Cir. 1967), *citing Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 333, 335, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961).

9. Dillon's expert witness, Dr. Stanley Block, testified that the company experienced a "rather precipitous dropoff of caster sales" after the termination. There were decreased sales of the Albion line and of other lines, although both categories of losses were said to be attributable to the termination. As a non-distributor, Dillon still had access to the Albion line but enjoyed a lower discount and had to absorb some additional freight expenses. Davis testified that because of these increased prices Dillon could not offer the Albion line on a competitive basis, resulting in decreased sales. Some customers dropped Dillon altogether because of its inability to supply Albion, supposedly causing lost sales of other casters.

In pertinent part, section 3 of the Clayton Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. Since there was no question that Albion was engaged in commerce or that the Dillon-Albion distributorship agreement was a contract for the sale of goods, Dillon's burden of proof at trial was two-fold. First, it was required to show that its purchases as a distributor of Albion casters were made on the "condition agreement or understanding" that it would not sell non-Albion casters. Second, it had to show the requisite effect on competition. As previously mentioned, the district

10. The district court recited an additional basis for the j. n. o. v. —insufficient evidence to support the jury's finding of damages attributable to Dillon's lost profits from the sale of non-Albion casters. Although Dillon disputes this finding, our disposition of the appeal makes it unnecessary for us to consider the question.

court held that the evidence was insufficient to support the jury's finding that the latter showing had been made. Our review is governed by the standards announced in *Boeing Co. v. Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). After a careful study of the entire record, we agree with the findings of the district court and, in addition, hold that there was insufficient evidence to support the jury's finding that sales to Albion distributors were made upon a condition, agreement or understanding of exclusivity.

[2] As an initial matter, it is important to note that the written distributorship agreeement between Albion and Dillon in no way restricted Dillon's right to sell cmpetitive goods. And none of the correspondence between the two companies mentioned such a restriction. In the absence of an express exclusivity requirement, however, an antitrust plaintiff is not foreclosed from making out a case. A course of dealing between seller and buyer may "ripen into an implied or informal agreement or understanding." *McElhenney Co. v. Western Auto Supply Co.,* 269 F.2d 332, 337 (4th Cir. 1959). The existence of such an agreement or understanding, of course, must be evaluated in light of all the circumstances peculiar to the case at hand. *Cf. Frey & Son, Inc. v. Cudahy Packing Co.,* 256 U.S. 208, 41 S.Ct. 451, 65 L.Ed. 892 (1921); *United States v. A. Schrader's Son, Inc.,* 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471 (1920).

Dillon's proof in this regard consisted almost entirely of comments made during several conversations between Davis and Albion management. And although Dillon sold casters manufactured by companies other than Col-

son,[11] the evidence primarily relates to Dillon's sales of the Colson line. First, Dillon points to the October 1971 negotiating session between Davis, Fierke and Karmalski. It must be remembered that Davis initiated these discussions and, to ensure that his bid for the distributorship was successful, Davis had to sell himself and Dillon to Albion's management.

Davis initially met with Albion's sales manager, Bud Fierke. He told Fierke about Dillon's operation and that Dillon was a Colson distributor. Davis testified that Fierke was "very interested in our relationship with Colson," although it is plain that Fierke never directed or asked Davis either to quit selling or phase out the Colson line. Davis, however, in what obviously was a purely gratuitous sales pitch, told Fierke that Albion would receive all of Dillon's caster sales in the Albion "62 series and up," since in Davis' opinion Colson did not manufacture industrial casters competitive with that portion of the Albion line. Fierke apparently was impressed with Davis' presentation, and the two men proceeded to a meeting with Albion's president, John Karmalski.

Davis' recollection of the meeting with Karmalski was as follows:

> [T]he Colson line was brought up again and I reiterated to Mr. Karmalski—he was concerned, he

11. Davis testified that in addition to Albion and Colson, Dillon sold casters manufactured by Jarvis & Jarvis, Fairbanks, Hamilton, Devine, Bridge Wheel, Gleason, Saginaw, Rapistan and Jakes. Charles S. Rhoads, Dillon's sales manager, added to this list the names of other "major" lines, including Bassick, Nutting, Midwest, Shepherd and R & K. The record makes it clear that Colson, Fairbanks, Nutting and Hamilton marketed industrial casters similar to at least part of the Albion line.

> told me that Colson distributors—they felt that Colson was a potential competitor for them and that where they had gone with Colson distributors before, they weren't pleased with it. I told [Karmalski and Fierke] again that Colson's line does not compete with Albion's line for what my needs were in [the Dallas] market, which was an industrial caster . . . .

Karmalski never stated or intimated that Dillon would be required to discontinue sales of Colson casters or any other products manufactured by Albion's competitors. Even when considered in the light most favorable to Dillon, these conversations evidence no more than an unsolicited pledge on Davis' part that Dillon would not sell certain Colson products that he considered *not* to be competitive with Albion's line.

Davis, of course, was successful in his bid for the distributorship, which was confirmed by a November 23, 1971 letter from Bud Fierke. Neither that letter nor Davis' response mentioned any restriction on the sale of non-Albion casters. And, according to Davis' own testimony, during 1972 nobody at Albion complained that Dillon was handling Colson or selling items that were competitive with Albion's line. The Colson topic, however, did surface during Bob Brettelle's March 1973 visit, although there is some dispute as to exactly what was said. Davis testified that Brettelle requested more business from Dillon and that Dillon could start by "giving [Albion] some of that Colson business." Brettelle's recollection of the conversation differed. He testified that although he mentioned that it "was unusual for Colson and Albion to be in the same house," he did not suggest any diversion of sales to Albion. Brettelle testified that

Dillon's sales for the first few months of 1973 were down and that he simply told Davis that sales of Albion products had to increase. The jury, of course, was free to believe Davis' testimony rather than Brettelle's. Even so, it would not have been reasonable to interpret Brettelle's remarks as a suggestion or demand that Dillon discontinue its sales of competitive goods.

The final phase of Dillon's proof centers around Albion's termination of the distributorship and the appointment of Casters of Dallas as Dillon's successor. According to Davis, when Brettelle cancelled the distributorship[12] in February 1974, he told Davis: "Dick, everyone knows you are married to Colson. You are just giving us problems. You are even running around making speeches for Colson."[13] And in a subsequent telephone conversation with Richard Dobbins, Albion's president, Dobbins told Davis that "if it wasn't for Colson we wouldn't have been having a problem in the first place."[14] Dillon also asserts that Casters of Dallas was awarded the Dallas distribuorship on the condition that non-Albion products not be

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12. The distributorship agreement required 30-days written notice of termination. It is agreed that Albion satisfied this contractual requirement.

13. The speech referred to by Brettelle was given by Davis at one of Colson's annual sales meetings for field sales personnel and management. The text was introduced into evidence as Plaintiff's Exhibit 1. Although Davis encouraged the group to complete their line by offering Albion's industrial casters, he also listed "married to Colson" as one of three "musts" in distributor marketing. He also noted that 50 percent of Dillon's annual sales went to Colson.

14. Davis' response was "that never was the deal with the company and [Albion isn't] losing any business because I [have] Colson." During an earlier conversation with Dobbins, Davis attempted to salvage the distributorship by offering to "set up a separate company strictly to handle Albion." Both statements underscore the fact that Dillon in fact sold non-Albion casters.

sold. The record, however, does not support this assertion. Although Wes Hale and Truman Powers testified that in light of Dillon's experience they did not think it would have been "a good idea" to handle Colson and that they promised to place their "major emphasis" on Albion in Dallas, the record shows that Casters of Dallas actually sold and continues to sell competitive goods.[15]

At trial, Brettelle did not deny that Dillon's sale of Colson casters was one of the reasons[16] for termination. He insisted, however, that Dillon was not terminated because it sold competitive goods but because Dillon was not selling enough Albion. A memorandum Brettelle wrote after his meeting with Davis confirms Brettelle's concern that Dillon had not been "pushing" the Albion line as it should have.[17] To be sure, Dobbins testified that one

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15. Wes Hale, the president of Casters of Dallas, initially approached Truman Powers to secure financial assistance for his company. At the time, Hale was attempting to secure the Faultless line in Dallas. Hale testified that although Faultless had a heavy-duty industrial line, he went after Albion because Powers "was having success in the Albion product *in conjunction with Faultless* in the Houston area." Powers testified that his company, which serves as the Albion distributor in Houston, and Casters of Dallas handle essentially the same lines, including Albion, Faultless, Hamilton, Nutting and others.

16. Brettelle testified that in addition to Dillon's relationship with Colson, the following factors entered into the decision to terminate: (1) decreased sales, (2) inadequate advertising, and (3) credit difficulties. Significantly, Brettelle stated that Dillon's distributorship would have been cancelled even if Dillon had ceased all sales of Colson casters.

17. In particular Brettelle noted that most of Dillon's inventory appeared to be Colson rather than Albion. In addition, the record shows that in 1973 Dillon sold $147,000 worth of Colson casters and only $58,622.05 worth of Albion. Dillon did sell some $21,000 worth of Albion's products to Materials Handling, Inc., the cart fabrication concern.

reason for the termination was Dillon's "inability or refusal to promote Albion's full line of products." Dobbins' testimony was reiterated by Wes Hale and Truman Powers, who said that in their discussions with Brettelle and Dobbins, both had expressed the feeling that most of Dillon's sales were going to Colson. In short, the evidence is at least as consistent with Albion's claim that Dillon was terminated in part because of a lack of Albion sales as with Dillon's contention that it was terminated for the mere sale of Colson casters.

[3, 4] On the basis of the evidence outlined above, we think it clear that there was insufficient proof for a reasonable jury to have concluded that Dillon and Albion had even an informal agreement or understanding of exclusivity.[18] Even more unsubstantiated were Dillon's claim and the jury's conclusion that Albion's alleged exclusivity requirement bound all of its distributors. During the period in question, Albion had from 35 to 41 stocking distributors nationwide. Dillon attempted to make

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18. We have based our discussion almost entirely upon the evidence claimed by Dillon to establish a practice of exclusive dealing and have found that evidence insufficient. To further substantiate our conclusion, we need only point to the testimony of Dillon's own employees. Jim Bussard, a "territory manager" for Dillon, was responsible for Dillon's promotion and sales. He testified that he never had heard of any restrictions on the types of products Dillon was permitted to sell after becoming an Albion distributor. James D. Brock, a Dillon salesman, also testified that he knew of no such restriction and that he felt free to sell whatever product he needed to sell in order to meet the customers' needs. Finally, Dillon's purchasing agent, Charles S. Rhoads, testified as follows:

> [W]e had a number of customers that [were] strictly Colson-oriented. This happened back when we had nothing else to offer them but Colson and *if they asked for Colson we gave them Colson*. And we bought where we could get delivery. And so *if Colson wheels were slow we bought Albion . . . or . . . Jakes or . . . R & K, whoever we could get them from.*" [emphasis added].

its case by introducing correspondence with Albion distributors from as far back as 1951. The vast majority of these letters, which concerned the establishment and maintenance of various distributors, made no mention of an exclusive dealing requirement. Four of the letters, however, contained a similar phrase which in essence said that Albion "assumed" the distributor would not sell competitive goods for the duration of the distributorship agreements. These letters were dated November 1, 1954, August 26, 1954, June 30, 1955, and May 8, 1964. Although the most recent letter was written eight years before Dillon became a distributor, Dillon attempts to propel them into the future by pointing out that both Karmalski and Dobbins testified that they did not change any of Albion's basic sales policies after becoming president. The weakness of Dillon's position should be obvious —the letters alone fall far short of establishing a "policy" of any sort in existence before 1971. Indeed, Richard Dobbins, who became Albion's president one month after Dillon became a distributor, testified that he knew of no such restrictive policy in effect when he took over and that no such policy had been in force during his tenure.[19]

19. In fact, Dobbins testified that "[m]ost of our distributors handle our competitor's and many, many of them are competitive." Dillon was unable to produce any other distributors to refute this testimony or to present any evidence that Albion had ever terminated a distributor for selling competitive goods.

Dillon's inability to show that Albion's distributors were bound by any sort of exclusive dealing agreement, of course, makes clear the correctness of the district court's conclusion concerning the effect-on-competition prerequisite. The basic evil meant to be curbed by section 3 is the foreclosure of the market to competitors of the seller. Dillon produced no evidence, either directly or indirectly, that Albion's competitors were precluded or discouraged from entering the market because of any practice or policy of Albion.

On the record before us, we need not resolve one of the basic disputes in this litigation—whether Dillon's showing that Albion

[5] In light of our holding that there was insufficient evidence for a reasonable jury to conclude that the sale of Albion casters to Dillon was based on a "condition,

enjoyed from 8 to 12 percent of the nationwide caster market and sold from $3 to $8 million worth of casters annually suffices to show a "substantial lessening of competition." The parties in this case, the courts and commentators have debated whether the "quantitative substantiality" test announced by the Supreme Court in *Standard Oil v. United States*, 337 U.S. 293, 299-315, 69 S.Ct. 1051, 1055. 93 L.Ed. 1371 (1949) (test is whether competition may be foreclosed "in a substantial share of the line of commerce affected"), was in any way changed by the apparently broader inquiry outlined in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1960):

> To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence.

Id. at 329, 81 S.Ct. at 629. The Supreme Court has not attempted to reconcile the approaches, and we need not attempt to do so here, since it is plain that Dillon failed to satisfy the less exacting inquiry made in *Standard Oil*.

In *Standard Oil* the government, which complained of contracts requiring dealers to purchase gasoline and TBA exclusively from the defendant, showed that the challenged contracts bound some 6,000 service stations in the geographic market involved. 337 U.S. at 295, 69 S.Ct. 1051. Similar showings were made in other Clayton Act cases ultimately decided by the Court. *E. g., Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 461-62, 61 S.Ct. 703, 85 L.Ed. 949 (1941); *see International Salt Co. v. United States*, 332 U.S. 392, 394-95, 68 S.Ct. 12, 92 L.Ed. 20 (1947); *International Business Machines Corp. v. United States*, 298 U.S. 131, 132-36, 56 S.Ct. 701, 80 L.Ed. 1085 (1936); *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 454-57, 42 S.Ct. 363, 66 L.Ed. 708 (1922). Dillon, on the other hand, proved Albion's percentage market share but did not show what portion, if any, of the market had been pre-empted by an exclusivity arrangement with the distributors. We do not mean to intimate that a seller cannot violate the Clayton

agreement, or understanding" of exclusivity, Dillon's Clayton Act claim is reduced, at best, to a termination of its distributorship in part because of its promotion of the Colson line. It is well settled, however, that in the absence of any forbidden agreement a seller may unilaterally refuse to do business with a buyer without running afoul of the antitrust laws. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919).[20] As this court held in *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (1953):

> Section 3 of the Clayton Act, by its express terms, covers only leases, sales or contracts actually made on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor of the lessor or seller.

Act by entering an exclusive dealing contract with a single buyer, *see Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653 (1922), or that Dillon was bound to prove such an arrangement with each and every one of Albion's distributors. However, proof of percentage market share and dollar volume alone, without any proof of the breadth of exclusive dealing, is inadequate.

20. The *Colgate* doctrine has been re-examined by the Supreme Court on numerous occasions. *See Simpson v. Union Oil Co.*, 377 U.S. 13, 17, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 38-49, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 722-23, 64 S.Ct. 805, 88 L.Ed. 1024 (1944); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 451-54, 42 S.Ct. 150, 66 L.Ed. 307 (1922); *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 209-11, 41 S.Ct. 451, 65 L.Ed. 892 (1921); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 96-100, 40 S.Ct. 251, 64 L.Ed. 471 (1920). Although the basic principle has been narrowed considerably in recent history, we find nothing in the record to indicate that Albion did not successfully traverse the narrow path clearly by the Court.

> There is nothing whatever in the Act to suggest that it covers a situation where the manufacturer refuses to make a sale or enter into a contract, and it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with anyone for reasons sufficient to himself. . . . There is a real difference between the act of refusing to deal and the execution of a contract which prevents a person from dealing with another.

Id. at 915-16 (footnote and citations omitted); *accord Timken Roller Bearing Co. v. FTC*, 299 F.2d 839, 842 (6th Cir.), *cert. denied*, 371 U.S. 861, 83 S.Ct. 118, 9 L.Ed.2d 99 (1962); *Associated Beverages Co. v. P. Ballantine & Sons*, 287 F.2d 261, 265 (5th Cir. 1961); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 337-39 (4th Cir. 1959); *Leo J. Meyberg Co. v. Eureka Williams Co.*, 215 F.2d 100, 100 (9th Cir.) (per curiam), *cert. denied*, 348 U.S. 875, 75 S.Ct. 113, 99 L.Ed. 689 (1954); *Elliott & Frantz, Inc. v. Raygo, Inc.*, 379 F.Supp. 498, 501-502 (E.D. Pa. 1974). *Cf. Scanlan v. Anheuser-Busch, Inc.*, 388 F.2d 918, 921 (9th Cir.), *cert. denied*, 391 U.S. 916, 88 S.Ct. 1810, 20 L.Ed.2d 654 (1968) (unilateral change of distributors without effect on availability of competing goods not violation of antitrust laws). The thrust of these cases is clear—a refusal to deal is by definition a refusal to enter into the requisite sale or lease.

In summary, we conclude that there was wholly insufficient evidence to support the jury's finding that Albion violated section 3 of the Clayton Act. We see no reason to discuss Dillon's other arguments on appeal. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3670

DILLON MATERIALS HANDLING INC.,
Plaintiff-Appellant,

v.

ALBION INDUSTRIES, Division of
KING-SEELEY THERMOS CO.,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(March 16, 1978)

Before TUTTLE, COLEMAN and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ ELBERT P. TUTTLE
United States Circuit Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-74-918-G

DILLON MATERIALS HANDLING,
INCORPORATED

v.

ALBION INDUSTRIES, Division of KING-SEELEY
THERMOS COMPANY

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Patrick E. Higginbotham, District Judge, presiding, and the issues having been duly tried and the Court having granted the Defendant's Motion for Judgment Notwithstanding the Verdict,

It is ORDERED, ADJUDGED and DECREED that judgment be entered in favor of Albion Industries, Division of King-Seeley Thermos Company, and against Dillon Materials Handling, Incorporated, denying all relief sought. Each party will bear its own costs.

Ordered entered the 17th day of August, 1976, this 15th day of July, 1977.

/s/ PATRICK E. HIGGENBOTHAM
United States District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-74-918-G

DILLON MATERIALS HANDLING,
INCORPORATED, Plaintiff

v.

ALBION INDUSTRIES, Division of KING-SEELEY
THERMOS COMPANY, Defendant

JUDGMENT N.O.V.

Aug. 1, 1976

The court has considered carefully the briefs and arguments of counsel and is of the opinion that there is insufficient evidence to support the jury's implicit finding that the effect of any exclusive dealing agreement may have been to substantially lessen competition or tend to create a monopoly in a line of commerce and that judgment n.o.v. in favor of defendant and against plaintiff should be entered.

The court further finds that there is insufficient evidence to support the jury's finding of damages in response to Question No. 4(b) and the same could only be the result of impermissible speculation. Accordingly, it is ORDERED that judgment be entered in favor of Albion Industries, Division of King-Seeley Thermos Company,

and against Dillon Materials Handling, Incorporated, denying all relief sought. Each party will bear its own costs.

SIGNED AND ENTERED this 17th day of August, 1976.

/s/ PATRICK E. HIGGINBOTHAM
Patrick E. Higginbotham
United States District Judge

Supreme Court, U. S.
FILED
JUL 10 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1760

DILLON MATERIALS HANDLING, INC.,

Petitioner,

v.

ALBION INDUSTRIES, A Division of KING-SEELEY THERMOS COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1760

DILLON MATERIALS HANDLING, INC.,
Petitioner,

v.

ALBION INDUSTRIES, A Division of
KING-SEELEY THERMOS COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court of The United States:

Respondent, Albion Industries, a Division of King-Seeley Thermos Company (hereinafter sometimes called "Albion"), presents this its Respondent's Brief in Opposition to the Petition for Writ of Certiorari of Petitioner, Dillon Materials Handling, Inc. (hereinafter sometimes called "Dillon").

OPINIONS, STATUTES AND JURISDICTION

The opinions of the courts below, the statutes involved in this case, and the jurisdiction of the Court are contained in Dillon's Petition.[1]

[1] Albion would point out an error in Dillon's reproduction of the court of appeals opinion. On page 60 of Dillon's Petition, the first full paragraph states that "[o]n September 19, 1974, Albion filed suit against Dillon . . . ." That sentence should read "[o]n September 19, 1974, Dillon filed suit against Albion . . . ." 567 F.2d at 1301.

STATEMENT OF THE NATURE OF THE CASE

Dillon, a terminated distributor, brought an action under section 1 of the Sherman Act and section 3 of the Clayton Act against Albion. Prior to trial, Albion filed and urged the district court to grant its motion for summary judgment on all counts, particularly the alleged violations of section 3 of the Clayton Act. Tr. 170.[2] At the close of Dillon's evidence and at the close of all the evidence, Albion filed motions for directed verdict on all alleged violations. R. 1160, 1927. These motions were carried by the district court, which allowed the case to go to the jury on special interrogatories. Tr. 314.

Subsequent to the jury verdict, Albion filed its motion for judgment n.o.v., which the district court granted. Tr. 327, 336. The court of appeals affirmed the district court. 567 F.2d 1299 (1978). Albion respectfully submits that the petition for writ of certiorari should not be granted in this case for the reasons that: (1) Dillon failed to prove a violation of section 3 of the Clayton Act as correctly determined by both lower courts; (2) Dillon seeks review of the sufficiency of evidence questions properly considered and rejected by both lower courts; (3) no conflict exists with Supreme Court precedent nor with any court of appeals; (4) Dillon failed to plead or prove any "sale or contract for sale" on the condition proscribed by section 3 of the Clayton Act; and (5) this case is not of sufficient legal breadth or scope to warrant this Court's granting a writ of certiorari.

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[2] Due to a duplication of page numbers between Volume I of the Record and Volume II, *et seq.*, those items which related to pages of the pleadings, motions and orders of the trial court which are contained in Volume I will be referred to as Tr. ..... and reference to testimony will be referred to merely as R. ..... which begins in Volume II.

STATEMENT OF FACTS

Albion cannot adopt the statement of facts contained in Dillon's Petition. Albion adopts the fact statements contained in the opinion of the Court of Appeals for the Fifth Circuit as the correct statement of facts together with the following additional facts.

It is undisputed that Albion never threatened Dillon with cancellation of its distributorship for *any* reason. Indeed Dillon's first suspicion that it was going to be terminated occurred when Albion's sales manager came to Dallas on February 24, 1974, to tell Dillon's president of the termination. R. 284. Albion knew that Dillon sold competitive casters from the time Dillon was appointed an Albion distributor. R. 123. The letter appointing Dillon as an Albion distributor in November 1971 did not require Dillon to refrain from dealing in casters competitive to Albion casters. Def. Ex. 2. Dillon's president testified that Albion never asked or required Dillon to stop distributing competitive casters. R. 124, 301. At no time did Albion require Dillon's promise to stop selling Colson or any other brand of caster in order to get or keep the Albion distributorship. R. 123.

During 1973 Albion experienced increasing difficulty getting Dillon to pay Albion's invoices within its credit terms of 1% 10 days - Net 30. R. 1337 and Def. Ex. 5. Albion personnel were making frequent telephone calls to Dillon concerning the status of its account. R. 1343-1378. In addition, Albion put Dillon on "credit hold" and refused to make shipments on approximately ten different occasions while Dillon was a distributor. R. 1379. Even Dillon's president could recall being placed on credit hold. R. 175.

Dillon's lack of efforts to promote Albion casters was typified by the fact that it was not until October 1974, some six months after being cancelled by Albion, that Dillon first listed the name Albion in any of its Dallas

Yellow Page advertising. R. 272 and Def. Ex. 64C. The listing of Albion in its Yellow Page ad was done, according to Dillon's president, to show the public that Dillon could still supply Albion casters. R. 274.

Albion's president, Mr. Dobbins, testified that Albion had had no exclusive dealing requirement in order for a distributor to get, or keep, the Albion product line. R. 572, 645. Another Albion distributor testified that no one at Albion ever told him, as an Albion distributor, that he was not free to deal in and sell products which were competitive with the Albion line. R. 955. This same distributor testified that certain of the products which it carried both in Houston and Dallas were competitive with Albion products. R. 955.

There is no suggestion from testimony in the record that Albion had made even one sale to Dillon upon the condition of exclusivity of product.

Dillon did not present any evidence that any sales were made by Albion to the successor Albion distributor who replaced Dillon, upon the condition that such distributor not handle competitive products. To the contrary, the distributor who succeeded Dillon sells competitive products in both Dallas and Houston. R. 857, 859, 946 and 955.

The statement of facts in Dillon's Petition fails to set forth any evidence of even a tendency to substantially lessen competition or create a monopoly in any line of commerce. The fact that all evidence in the trial court on this point was unfavorable to Dillon's position explains this omission. Dillon offered no testimony as to any fact indicating that Albion's alleged exclusive distributorship policy in any way adversely affected Albion's competitors' ability to sell casters competitive with Albion. Therefore, this record is entirely void of any evidence of a tendency to substantially lessen com-

petition or create a monopoly in any line of commerce as required by section 3 of the Clayton Act.

The only testimony concerning effects upon competition was as follows: (1) Dillon's president testified that the effect of cancellation *on Dillon* has been that Dillon no longer has a complete line and cannot be as competitive with local competitors as before termination, R. 173; (2) Dillon's president testified that after termination there was "an awful lot" of competition in the caster business and even "more so than there has been in the past" for Dillon, R. 388; and (3) Dillon's successor to the Albion distributorship stated that there was a considerable amount of competition from other caster manufacturers and distributors after it acquired the Albion distributorship, R. 889. The record is totally void of testimony concerning any adverse effect on competition in the United States caster market by an alleged Albion policy of exclusivity of product or by Albion's termination of Dillon.

At pages 34-35 of Dillon's Petition, Dillon states that Albion sells at least 70% of all industrial casters sold in the caster industry. This is a misstatement not supported by the record. The speculative testimony of Dillon's president, Davis, (which was admitted over the strenuous objection of Albion's counsel because there was no predicate laid for the testimony and there was no factual basis given for this testimony) was that Albion sold 70% of certain limited sizes of casters which Davis testified were not available to Dillon on the same basis that Albion's casters were available. R. 211-223. Davis testified at length that the competitive casters available to Dillon in those certain sizes produced by Albion were not available to Dillon "on the same basis" as Albion's casters were available to it. Dillon's "on the same basis" argument presumably means that (a) Dillon was not an "exclusive stocking distributor" for Albion's competitors on these limited sizes of casters,

(b) Dillon did not get as large a discount from Albion's competitors on these limited sizes of casters, or (c) delivery times, terms or other factors were not as favorable from Dillon's standpoint as purchasing Albion's casters during the time it was an Albion distributor. Davis speculated that, as to these certain sizes of casters, Albion enjoyed 70% of the sales in the U.S. market, whatever that undefined market may be interpreted to be. R. 226. Davis further speculated that, as to the certain few items that were "just not offered by any other manufacturer", Albion enjoyed in excess of 70% of some unidentified market. R. 227. Davis speculated that in the Albion series 62, and larger series of casters, Albion enjoyed in excess of 70% or more of yet another undefined market. R. 228-229. There is no testimony in this record that supports an assumption that Dillon sells throughout the U.S. market, or that Dillon's customers can reasonably be expected to look throughout the U.S. market to satisfy their caster needs. There is no testimony as to the percentage of caster sales in the undefined market enjoyed by Albion and in which Dillon does make sales of casters.

RESPONSE TO QUESTIONS PRESENTED

1. THE RENDITION OF JUDGMENT N.O.V. BY THE DISTRICT COURT AND THE COURT OF APPEALS' AFFIRMANCE WAS PROPER.

A. Application of the *Boeing v. Shipman* test was proper in that no conflict exists with Supreme Court precedent nor with any court of appeals.

Dillon alleges that the appropriate standard for reviewing the sufficiency of the evidence to support a judgment n.o.v. in antitrust actions is that set forth in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Dillon further alleges that the *Boeing Co. v. Shipman* test[3] utilized by the court of

[3] The *Boeing* test is stated as follows, 411 F.2d at 374-75:
"On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and *with all reasonable inferences* most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that *reasonable men* could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is *substantial evidence opposed to the motions*, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. *A mere scintilla of evidence is insufficient to present a question for the jury.* The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. *There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.*" (Emphasis added.)

appeals is inappropriate and in conflict with the Court's test in *Continental*. *Continental* requires that: (1) the evidence be viewed in the light most favorable to the party opposed to the motion; (2) the evidence be given the benefit of all inferences which it fairly supports, even though contrary inferences might reasonably be drawn; and (3) the jury be allowed to weigh the contradictory evidence and inferences and draw the ultimate conclusion as to the facts. 370 U.S. at 696-701. The requirements of *Boeing*[4] demand no less than the Supreme Court demands in *Continental*. The *Boeing* test, thus, is as appropriate in the case at bar as would be the Court's own test in *Continental*.

Dillon asserts that by citing a FELA case, *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29 (1944), twice within the *Continental* opinion it is "clear that the court [sic] considered the same standards applicable

[4] *See* note 3, *supra*.

to both FELA and antitrust cases".[5] Albion cannot agree. *Tennant* is cited once by the Court in a footnote as indirect support for the proposition that the court must examine the evidence in the light most favorable to the party opposed to the motion.[6] The Court then cites *Tennant* within the text to establish that the jury "'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'"[7] The Court in *Continental* never concludes that the standards used for reviewing the sufficiency of the evidence in an antitrust case and a FELA case are one and the same.

In 1977 the Court was again faced with a question concerning the propriety of a judgment n.o.v. in the antitrust context. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 479 (1977). The judgment n.o.v. was found proper with the Court citing the standard affirmed in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), and cited in *United States v. Generes*, 405 U.S. 93 (1972). That test was stated as follows:

> "A ... court ... has the duty to direct a verdict 'where the evidence is without dispute or is conflicting but of such a conclusive nature that if a verdict were returned for the plaintiff or defendant, as the case may be, the exercise of sound judicial discretion would require that it be set aside.'" *Martin K. Eby Constr. Co. v. Neely*, 344 F.2d 483, 484 (10th Cir. 1965), *aff'd.*, 386 U.S. 317 (1967).

[5] Dillon's Petition, p. 24. The absence of identical language is not controlling. *See Galloway v. United States*, 319 U.S. 372 (1943). *See also* note 12, *infra.*

[6] 370 U.S. at 696 n.6.

[7] *Id.* at 701.

Significant is the fact that the standard utilized by the Court in these cases was not the FELA standard announced in *Lavender v. Kurn*, 327 U.S. 645 (1946).[8]

The Court's latest examination of judgment n.o.v. and sufficiency of the evidence in *Brunswick* reflects that the Court is not utilizing the *Kurn* "complete absence of probative facts" test in the antitrust area. Dillon's assertion of conflict with Supreme Court precedent is equally unfounded. The *Boeing* test, although admittedly not verbatim, tracks the Court's language in *Continental*. The Court never stated expressly, or by implication, that the FELA standard for reviewing the sufficiency of the evidence is appropriate in antitrust cases.

Assuming, *arguendo*, that the FELA standard is the appropriate standard from which to review the sufficiency of the evidence in the instant case, the result reached by the lower courts would remain unchanged. The district court judgment provided:

> "The court has considered carefully the briefs and arguments of counsel and is of the opinion that

[8] The *Lavender v. Kurn* test is stated as follows, 327 U.S. at 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added.)

> there is insufficient evidence to support the jury's implicit finding that the effect of any exclusive dealing agreement may have been to substantially lessen competition or tend to create a monopoly in a line of commerce and that judgment n.o.v. in favor of defendant and against plaintiff should be entered."[9]

This judgment was affirmed by the court of appeals. 567 F.2d 1299 (1978). Judgment n.o.v., thus, was granted due to Dillon's failure at trial to establish the requisite effect on competition.

Dillon asserts that the FELA test was "best enunciated" in *Lavender v. Kurn, supra.*[10] Accepting this "complete absence of probative facts" test as the appropriate one for purposes of argument, a judgment n.o.v. would still be required. As found by the court of appeals:

> Dillon produced *no* evidence, either directly or indirectly, that Albion's competitors were precluded or discouraged from entering the market because of any practice or policy of Albion. 567 F.2d at 1305 n.19. (Emphasis added.)

In view of the complete absence of facts at trial to establish a restraint on trade, *Lavender v. Kurn* would demand the entry of a judgment n.o.v., which would be the identical result reached by the lower courts.

This Court, however, should not expand the application of the FELA standard, as exemplified in *Lavender v. Kurn*, to non-FELA cases. The expanded application of the FELA standard would represent a return to the scintilla rule which was repudiated by the Supreme Court as early as 1871. *Improvement Co. v. Munson,*

[9] *See* Dillon's Petition, Appendix D.

[10] *See* note 8, *supra.*

81 U.S. 442 (1871). *See* 5A *Moore's Federal Practice* ¶ 50.02[1] (1977); *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 563-64 (1957) (Harlan, J., dissenting). Under the abandoned scintilla rule a court could not direct a verdict so long as there was *any evidence* in support of the proposition tendered. The *Kurn* "complete absence of probative facts" test is simply a restatement of the long-abandoned scintilla rule.

As Professor Moore aptly stated, the judicial authorities on the question of the appropriate standard to be used for directing a verdict are generally in accord although the language utilized remains diverse. 5A *Moore's Federal Practice* ¶ 50.02[2] (1977). The validity of this observation is supported by a review of the cases which clearly reveals that "the 'substantial evidence' or 'reasonable man' test formulated by *Boeing*"[11] is in accord with all other circuits. Albion respectfully submits that any inference that the circuits are in conflict is simply not supported by the authorities.[12] An examination of the authorities clearly demonstrates that the standards are substantively the same. Although some circuits phrase their standard in terms of "reasonable" and others prefer "substantial", it is a distinction without a difference. "Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938). It is appropriate to recall this Court's admonition that the function of review is not ". . . greatly aided by substituting one general formula for another." *Galloway v. United States*, 319 U.S. 372, 395 (1943). Rather, this Court has emphatically stated that ". . . the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making

[11] Dillon's Petition, p. 21.

[12] First Circuit:

> It is proper to direct a verdict in a case where the evidence is such that, without weighing the credibility of

due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere

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the witnesses or otherwise considering the weight of the evidence, there is only one verdict reasonable men could reach .... If the evidence is of such quality and weight that reasonable men might reach different conclusions in the exercise of impartial judgment, a motion for directed verdict should be denied.

Harrington v. United States, 504 F.2d 1306, 1311 (1st Cir. 1974), *citing, inter alia, Trawick v. Manhattan Life Insurance Co.*, 484 F.2d 535 (5th Cir. 1973) (other citations omitted). [*Trawick* is one of *Boeing's* progeny.]

Second Circuit:

"If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969)."

Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737, 742-43 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). *See National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953 (2d Cir. 1978).

Third Circuit:

An articulate statement of the federal standard in diversity cases was made by the Fifth Circuit, following an exhaustive survey, in *Boeing Company v. Shipman* ... [quoting the *Boeing* court].

Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205, 1212 n.7 (3rd Cir.), *cert. denied*, 400 U.S. 826 (1970).

Fourth Circuit:

A direction should be granted where there is "no substantial evidence to support" the verdict asked of the jury.

difference in labels used to describe this standard . . . cannot amount to a departure from 'the rules of the

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Business Develop. Corp. v. United States, 428 F.2d 451, 453 (4th Cir.), *cert. denied*, 400 U.S. 947 (1970). *See Hawkins v. Sims*, 137 F.2d 66, 67 (4th Cir. 1943).

Fifth Circuit: *See* note 3, *supra*.

Sixth Circuit:

The court must construe the evidence most strongly in favor of the party against whom the motion is made, and, where there is substantial competent evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. . . . *Durham v. Warner Elevator Mfg. Co.*, 166 Ohio St. 31, 36, 139 N.E.2d 10, 14 (1956).

Domany v. Otis Elevator Co., 369 F.2d 604, 608 (6th Cir. 1966). *See Davis v. Marathon Oil Co.*, 528 F.2d 395 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

Seventh Circuit:

In [reviewing the lower court's decision] we are not deciding whether the weight of the evidence does or does not support an antitrust violation. We are not weighing the evidence but only inquiring as to whether there is any substantial evidence which would support a verdict, for if there was then a motion for judgment notwithstanding the verdict insofar as the antitrust issue was concerned should have been overruled.

Fontana Aviation, Inc. v. Beech Aircraft Corp., 432 F.2d 1080, 1084 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

Eighth Circuit:

There must be conflict in substantial evidence to create a jury question. Neither a directed verdict nor judgment n.o.v. should be granted unless the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion.

Hernon v. Revere Copper and Brass, Inc., 494 F.2d 705, 709 (8th Cir.), *cert. denied*, 419 U.S. 867 (1974).

common law which the Amendment requires to be followed.'" 319 U.S. at 395.

Ninth Circuit:

> When considering the propriety of the grant or denial of a motion for directed verdict, the correct standard is whether or not, viewing the evidence as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party.

Chisholm Brothers Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137, 1140 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974). *See Quichocho v. Kelvinator Corp.*, 546 F.2d 812 (9th Cir. 1976).

Tenth Circuit:

> .... [T]he evidence must be viewed in the light most favorable to the party opposing the motion (together with inferences which may be fairly drawn therefrom), and the verdict not directed nor the motion granted unless the evidence points all one way, and is susceptible of no reasonable inferences which sustain the position of the party against whom the motion is directed. The motion must also be denied if the evidence and the inferences, so examined, are such that reasonable men may reach different conclusions. *Kippen v. Jewkes*, 258 F.2d 869 (10th Cir.)

McCracken v. Jones, 562 F.2d 22, 25 (10th Cir. 1977).

D.C. Circuit:

> It is the function of the judge to identify those conflicts [in evidence] which are serious and substantial and jury resolution of which is, accordingly, crucial to the issue of liability.

Law v. Virginia Stage Lines, Inc., 444 F.2d 990, 995 (D.C. Cir. 1971).

B. The *Boeing v. Shipman* test does not violate the seventh amendment.

The constitutional argument made by Dillon does not challenge generally the power of federal courts to withhold or withdraw from the jury cases in which the claimant puts forward insufficient evidence to support a verdict. This Court has long recognized the constitutionality of the directed verdict and judgment n.o.v. *Galloway v. United States*, *supra*, and cases cited therein. *See also, Neely v. Martin K. Eby Construction Co.*, *supra*. Dillon asserts, however, that application of the *Boeing* test deprives it of its constitutional right to a jury trial guaranteed by the seventh amendment.

The judgment n.o.v. affirmed and upheld as constitutional by this Court in *Galloway* utilized an identical test to that propounded by the Fifth Circuit in *Boeing*. In *Galloway* the court of appeals stated:

> A Federal Court is not permitted to submit a case to a jury on probabilities or a mere scintilla of evidence, but *there must be some substantial evidence offered* by the plaintiff to justify submission of the case to the jury. 130 F.2d 467, 470 (9th Cir. 1942), *aff'd*, 319 U.S. 372 (1943).

This Court examined the propriety of the inclusion of the word "substantial" within a judgment n.o.v. standard in *Galloway* and found it both proper and constitutional. Petitioner's constitutional argument is without merit.

2. DILLON FAILED TO ESTABLISH THE EXISTENCE OF AN EXCLUSIVE DEALING AGREEMENT OR THE PROSCRIBED EFFECT ON COMPETITION AS REQUIRED BY SECTION 3 OF THE CLAYTON ACT.

All of the cases relied upon by Dillon in its Petition regarding section 3 of the Clayton Act are distinguish-

able from this case in that they involved tying, requirements contracts or a limited patent monopoly combined with stringent enforcement of exclusive dealing provisions in the contracts. None of those elements is present in this case.

The district court held that Dillon failed to show that the effect of any exclusive dealing agreement may have been to substantially lessen competition or tend to create a monopoly in a line of commerce. The court of appeals affirmed the district court's judgment and additionally found that Dillon had failed to prove the existence of an exclusive dealing requirement in its dealings with Albion. The holdings of the lower courts were correct and are confirmed by this record in which Dillon's president, sales manager, purchasing agent and salesmen testified to the effect that Dillon sold whatever casters were necessary to satisfy its customers' needs. The record does not disclose any requirement imposed upon Dillon by Albion that brings this case within the conditions proscribed by section 3 of the Clayton Act. Further, the record is void of any harassment or threatened termination by Albion of Dillon's franchise for Albion casters.

Dillon, both in the lower courts and in its Petition to this Court, has never shown that any Albion policy may have had the proscribed effect on competition dictated by section 3 of the Clayton Act. To the contrary, the testimony of Dillon's own employees, from its president down to its salesmen, was to the effect that Dillon was not required to sell only Albion casters to the exclusion of all competitive casters. Additionally, Dillon failed to produce any evidence that Albion's policy may have had the effect of foreclosing the caster market to manufacturers of casters competitive to Albion's casters. Without such a showing, Dillon would never be successful in proving any violation of section 3 of the Clayton Act.

Despite these failings, Dillon has asked this Court to grant a writ of certiorari to impose liability under section 3 of the Clayton Act. This Court has set forth in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the requirements for the necessary economic study which Dillon failed even to attempt to satisfy in this case. This Court has recently denied certiorari on facts similar to the present case in *Davis v. Marathon Oil Co.*, 528 F.2d 395 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). *Davis* was an antitrust action under section 3 of the Clayton Act in which judgment n.o.v. was rendered for the defendant and affirmed by the Court of Appeals for the Sixth Circuit.

Dillon's Petition for Writ of Certiorari should be denied because the record in this case (a) fails to establish the existence of an exclusive dealing agreement, (b) fails to establish any adverse effect upon competition and (c) does show that the cancellation of Dillon and the appointment of the successor distributor had the effect of *increasing* competition in the area previously served by Dillon. If the Court were to grant a writ of certiorari in this case, and accept Dillon's position, it would become impossible for a manufacturer to terminate a distributor which sold competitive products. If Dillon's position were carried to its logical conclusion, the lucky dealer with both a Chevrolet and Ford dealership could never be terminated by either General Motors or Ford without expecting an antitrust claim that the termination was for retaliation because the dealer handled competitive products. This result would make no sense under the antitrust laws when the record here shows a pro-competitive effect at the distributor's level and *no* adverse effect at the manufacturer's level.

CONCLUSION

A proper analysis of the district court judgment and the well-reasoned court of appeals opinion requires that this Court deny certiorari in this case. The questions presented by Dillon's Petition for Writ of Certiorari are illusory and without merit. Therefore, such Petition should be denied by this Court.

Respectfully submitted,

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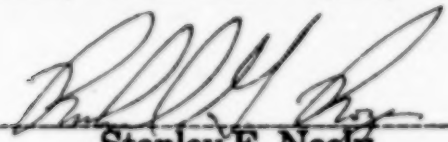
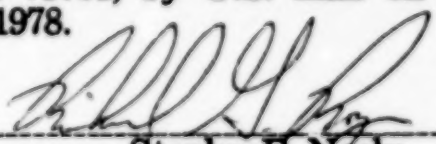
By 
Stanley E. Neely
Richard G. Rogers

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing document has been forwarded to opposing counsel, Mr. Paul Thorp, Matthews & Thorp, One Main Place, Dallas, Texas 75250 and Mr. Jack N. Price, Price & Williams, 306 East 11th Street, Suite L-7, Austin, Texas 78701, by U.S. mail on this the 7TH day of July, 1978.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